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Supreme Court, U.S.
FILED
AUG 15 1991
OFFICE OF THE CLERK

91-278
No. _____

In The

Supreme Court of the United States

October Term, 1991

THE ESTATE OF DAU VAN TRAN,
VI THI PHAM and DO VAN TRAN,

Petitioners,

v.

TEXACO REFINING AND MARKETING INC.
and
TEXACO MARINE SERVICE INC.,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of Texas

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. When an action for wrongful death is brought in the state court arising out of the death of a person in state territorial waters who is not a seaman, longshoreman or member of a crew of a vessel, but is a mere volunteer killed on a dock by the wave of a passing vessel, does the state wrongful death and the state survival statute apply with respect to the awarding of damages permitted by state law or does federal general maritime law pre-empt state law under such circumstances?

2. In a state court proceeding to recover for death of the person in state territorial waters who is not a seaman, longshoreman or member of a crew of a vessel, but is a mere volunteer killed on a dock in state territorial waters, may there be recovery for mental anguish by his survivors under the Texas wrongful death statute and the Texas survival statute?

3. Under general maritime law, where death occurs to a person in state territorial waters who is not a seaman, longshoreman or member of a crew of a vessel, but is a mere volunteer killed on a dock by the wave of a passing vessel, may his survivors recover for loss of society?

4. Is a defendant in a wrongful death case, which arises out of the death of a person who is not a seaman, longshoreman or member of a crew of a vessel, occurring in state territorial waters, required to plead the applicability of general maritime law as an affirmative defense in order to invoke the general maritime law of the United States instead of the state wrongful death act and survival statute?

QUESTIONS PRESENTED FOR REVIEW – Continued

5. Has Respondent Texaco waived the right to object to the awarding of damages for loss of society to the survivors of a decedent in a wrongful death case by failing to raise such issues, on appeal, to the Court of Appeals for the Ninth Judicial District, the initial appellate court to which this case was appealed?

6. When a judgment is reversed and remanded by the United States Supreme Court to the Court of Appeals for the Ninth Supreme Judicial District for reconsideration, is the Respondent Texaco, after the judgment is again affirmed by the Court of Appeals, required to take its appeal directly to the United States Supreme Court rather than the Supreme Court of Texas, which had originally denied writ of error of and from which denial of writ of certiorari was made to the United States Supreme Court?

CERTIFICATE OF INTERESTED PARTIES AND PARTIES BELOW

The following were parties in the proceedings below in addition to those parties identified in the caption hereof:

Farmer Boy's Catfish Kitchens International, Inc.
Theresa Nguyen
Anh Nguyen

The parent of Petitioner, Texaco Refining and Marketing, Inc., is:

TRMI Holdings, Inc., which is owned by Texaco, Inc.

The parent of Petitioner, Texaco Marine Services, Inc., is:

Texaco Overseas Holdings, Inc., which is owned by TRMI Holdings, Inc., which is owned by Texaco, Inc.

The following is a list of the subsidiaries and/or affiliates of Texaco, Inc., which have publicly-held debt or equity securities:

Texaco Capital, Inc.
Texaco Capital, N.V.
Texaco International Finance Corp.
Texaco, Inc.
Texaco Mexicana, S.A. de C.V.
Texaco Togo
Texaco Nigeria Limited
Texaco Ghana Limited
Refineria Texaco de Honduras, S.A.

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OPINION SOUGHT TO BE REVIEWED

The opinion of the Texas Supreme Court that Petitioners seek to have reviewed was reported as *Texaco Refining and Marketing, Inc. and Texaco Marine Services, Inc. vs. Estate of Dau Van Tran*, 808 S.W.2d 61 (Tex. 1991). It is reproduced as Appendix A to this petition.

STATEMENT OF JURISDICTION

Petitioners seek review of an opinion of the Texas Supreme Court at Austin, Texas. That opinion was issued April 24, 1991. A judgment on the opinion was also entered that day. (Appendix A)

The Texas Supreme Court denied Petitioners Motion for Rehearing on May 30, 1991. (Appendix B)

This petition is therefore timely under this Court's Rules 13.1 and 13.3 because the petition is filed within 90 days of the Texas Supreme Court's final denial of relief to Petitioners.

This Court has jurisdiction to consider this petition under 28 U.S.C. § 1257.

STATUTORY PROVISIONS INVOLVED IN THE CASE

46 U.S.C. § 688

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the

district in which the defendant employer resides or in which his principal office is located.

46 U.S.C. § 740

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water: Provided, that as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act or Suit in Admiralty Act, as appropriate, shall constitute the exclusive remedy for all causes of action arising after June 19, 1948, and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act: Provided further, that no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage.

46 U.S.C. § 761

Whenever death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child or dependent relative against the vessel, person, or

corporation which would have been liable if death had not ensued.

STATEMENT OF THE CASE

This action was a wrongful death/survivorship lawsuit stemming from an incident occurring on September 16, 1985, wherein Dau Van Tran was crushed to death while climbing up the side of a docked barge located on the Port Arthur ship channel in Port Arthur, Texas.

A suit was brought by the parents of Dau Van Tran against the two Texaco defendants (Respondents herein) under the provisions of the Texas wrongful death and survivorship statutes, alleging negligence, and against an entity known as Farmer Boy's Catfish Kitchens International, Inc., the owner/operator of the dock and fishing vessel involved in the incident. Early in the lawsuit, it was thought that Dau Van Tran was a member of the crew of the vessel involved, but subsequent discovery indicated he was not.

The only reference in Petitioners' pleading to the fact that Dau Van Tran might be a Jones' Act seaman referred only to the suit against Farmer Boy's Catfish Kitchens International, Inc. and this was abandoned at time of trial, since it turned out Dau Van Tran was a volunteer and not a seaman nor a member of a crew of a vessel.

Respondents went to trial, knowing full well that Petitioners were seeking recovery for various elements of damage, including mental anguish, loss of society and prejudgment interest, under the Texas statutes mentioned above, yet failed to plead that Petitioners were not entitled to recover such damages, or that federal maritime law applied. In fact, Respondents did not assert in the trial court any of the defenses that were asserted on appeal. It was only after judgment was entered that Respondents asserted for the first time that mental anguish damages could not be recovered and Respondents did not raise the issue of loss of society until November, 1990.

After a bench trial, the Judge entered findings of fact and conclusions of law (Appendix C) that exonerated the other

defendants, but found Respondent Texaco liable for negligently operating the vessel. The Court awarded damages of $1,324,849.55 (Appendix C), of which $575,000 was specifically denominated as compensation for the parents' mental anguish (Appendix C) and $575,000.00 for loss of society. The Court adjusted the award for Dau Van Tran's 15% negligence and for settlement Petitioners received from the shrimp boat owner (Appendix C), then entered final judgment dated September 28, 1988 (Appendix D) for $1,103,622.12, plus prejudgment interest.

Respondent Texaco appealed to the Ninth District Court of Appeals of Texas at Beaumont, Texas, which court affirmed the trial court's judgment (777 SW 2d 783) (Appendix E) and held that since the death occurred in state territorial waters, the state wrongful death and survival statutes would apply. Respondent Texaco appealed to the Texas Supreme Court, which denied Writ of Error.

Respondent Texaco then filed a Writ of Certiorari to the United States Supreme Court which writ was granted on June 28, 1990, at 110 S.Ct. 3266 (1990), vacating the judgment of the Court of Appeals of Texas, Ninth District, dated August 31, 1989, and remanding this cause to such court for reconsideration in light of *Sisson vs. Ruby*, 497 U.S. ___, 1990.

Upon reconsideration, the Court of Appeals for the Ninth Judicial District of Texas again affirmed the judgment of the trial court (795 SW 2d 870) (Appendix F).

Writ of Error was granted by the Supreme Court of Texas upon application of Respondent Texaco and on April 24, 1991, the judgment of the Court of Appeals was reversed and the cause was remanded to the trial court for entry of judgment consistent with the opinion. (Appendix A)

Petitioners' Motion for Rehearing was denied on May 31, 1991. (Appendix B)

Petitioners ask this court to review the decision of the Texas Supreme Court to apply federal maritime law as the exclusive remedy for the survivors of a person killed in state territorial waters even though the person killed was not a seaman, longshoremen nor a member of a crew of a vessel,

but was a volunteer who was climbing up the side of a dock when he was crushed by the wave of a passing vessel owned by Texaco.

Petitioners also ask this court to review the decision of the Texas Supreme Court holding that there is no recovery for damages for mental anguish by the survivors of a person killed in state territorial waters who was neither a seaman, longshoreman nor a member of a crew of a vessel.

Petitioners also ask this court to review the decision of the Texas Supreme Court holding that under general maritime law, there is no recovery of damages for loss of society for the survivors of a person killed in state territorial waters who was neither a seaman, longshoreman nor a member of a crew of a vessel, but was a mere volunteer.

Petitioners also ask this court to review the decision of the Texas Supreme Court holding that Respondents do not have to specifically plead the applicability of general maritime law as an affirmative defense where a person who is not a seaman, longshoreman nor member of a crew of a vessel is killed in state territorial waters.

Petitioners also ask this court to review the decision of the Texas Supreme Court in holding that there is no recovery for loss of society because this point of error was waived by Respondent Texaco by failing to raise this point of error in its initial appeal to the Court of Appeals for the Ninth Judicial District of Texas.

Petitioners also ask this court to review the question of whether, after the United States Supreme Court reversed and remanded the judgment of the Court of Appeals for the Ninth Supreme Judicial District of Texas, an appeal from another decision of the Court of Appeals should have been made directly to the United States Supreme Court rather than the Supreme Court of Texas, which had originally denied writ of error.

Petitioners ask this court to vacate the judgment of the Texas Supreme Court and to reinstate the judgment of the trial court applying the state wrongful death act and the state survival statute and to modify the judgment accordingly.

REASONS FOR GRANTING THE WRIT

The question presented in this case is whether the survivors of a decedent suing for death occurring in state territorial waters may recover under the state wrongful death and survival statutes rather than under general maritime law where the person killed was neither a seaman, longshoreman nor a member of a crew of a vessel, but was a mere volunteer who was killed by the wave of a passing vessel while climbing up a dock.

In *The Harrisburg*, 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed. 358 (1886), this court held that an action for wrongful death was purely statutory and because no federal statute addressed maritime wrongful death, the federal general maritime law did not provide a wrongful death remedy.

Both the United States Supreme Court and Congress acted to alleviate the harshness of that result. In *The Hamilton*, 207 U.S. 398, 28 S.Ct. 133, 52 L.Ed. 264 (1907), this court held that a maritime claimant could recover under state wrongful death laws if those laws purported to reach the maritime situs of the death.

In 1920, Congress enacted two statutes. The *Death on the High Seas Act*, 46 U.S.C. § 761 *et. seq.*, providing a remedy for deaths occurring outside the state's territorial waters, and left the decision in *Hamilton* intact by preserving state remedies for deaths occurring within state territorial waters. The *Jones Act*, 46 U.S.C. § 688, allowed seamen to recover against their employers for negligence resulting in death regardless of the situs of the death.

In 1970, this court expressly overruled *The Harrisburg* in *Moragne vs. State Marine Lines, Ltd.*, 398 U.S. 375, (1970) and held that federal maritime law afforded a remedy for tortious deaths occurring on state territorial waters. *Moragne* 398 U.S. 377. Cases decided before and after *Moragne* indicate that the *Moragne* decision should not be construed as holding that general maritime law pre-empts state statutory remedies for deaths occurring in state territorial waters.

The Texas Supreme Court, in its opinion, recognized that neither the *Jones Act*, 46 U.S.C § 688, applied since the

decedent was not a seaman, nor did the *Death on the High Seas Act*, 46 U.S.C. § 761, *et. seq.*, apply because the death did not occur beyond state territorial waters and that the *Longshoreman & Harborworkers Compensation Act*, 33 U.S.C § 901, *et. seq.*, did not apply because the decedent was not a longshoreman. The Texas Supreme Court, however, erroneously applied the *Admiralty Extension Act of 1948*, 46 U.S.C. § 740, as the basis for holding that the general maritime law pre-empted the applicability of the state wrongful death and survival statutes. The Texas Supreme Court further held that damages for mental anguish were not compensable under a maritime wrongful death remedy citing *Sea-Land Services, Inc. vs. Gaudet*, 414 U.S. 573 (1974), and that loss of society was not recoverable under general maritime law, citing *Miles vs. Apex Marine*, 59 U.S.L.W. 4001 (Nov. 6, 1990), which is clearly erroneous.

If this decision is allowed to stand, then every person injured or killed in any navigable waterway of the United States within a state's territorial waters would be required to ignore the laws of that particular state with regard to remedies for personal injury and wrongful death even if the person killed or injured was neither a seaman, longshoreman nor a member of a crew of a vessel. When Congress enacted the *Death on the High Seas Act*, 46 U.S.C. § 761 *et. seq.*, it specifically excluded wrongful death occurring in territorial waters because Congress realized that for over a century, from the date of the decision in *The Harrisburg*, that state wrongful death statutes adequately protected citizens of those states and that there was no need for federal maritime law to pre-empt those statutes. The only exceptions made by Congress were in the cases of seamen, (the *Jones Act*, 46 U.S.C § 688), and longshoremen (*Longshoreman & Harborworkers Compensation Act*, 33 U.S.C. § 901, *et. seq.*).

Petitioners respectfully request this court to reverse the decision of the Texas Supreme Court in order to allow private citizens to pursue wrongful death remedies under the state law where death occurs in state territorial waters.

The Supreme Court of Texas further held that under general maritime law, survivors of a decedent killed in state

territorial waters who was not a seaman, longshoreman nor a member of a crew of a vessel, could not recover for loss of society, citing *Miles vs. Apex Marine Corporation*, 59 U.S.C.W. 4001 (1990), a case involving death of a seaman, as authority. This is in direct conflict with *Sea-Land Services, Inc. vs. Gaudet*, 414 U.S. 573 (1974), *American Export Lines vs. Galvez*, 446 U.S. 274 (1980), and other federal cases involving injury or death in state territorial waters. Petitioners request this court to reinstate the judgment allowing recovery of damages for loss of society even if it is determined that general maritime law applies.

ARGUMENT

A. The Texas Supreme Court Erred In Holding That General Maritime Law Pre-empts The Texas Wrongful Death Statute And The Texas Survival Statute Where Death Occurs In State Territorial Waters To A Person Who Is Not A Seaman, Longshoreman Nor A Member Of A Crew Of A Vessel, But Was A Mere Volunteer Killed On A Dock By The Wave Of A Passing Vessel.

B. The Texas Supreme Court Erred In Holding That Damages For Mental Anguish Are Not Recoverable By The Survivors Of A Person Killed In State Territorial Waters Who Was Not A Seaman, Longshoreman Nor A Member Of A Crew Of A Vessel, But Was A Mere Volunteer Killed On A Dock By The Wave Of A Passing Vessel.

For over a century, state wrongful death statutes have provided a remedy to those whose decedents were killed in state territorial waters. Under the rule of *The Harrisburg*, 119 U.S. 199 (1886), general maritime law did not afford a cause of action for death resulting from a maritime tort. Thus, from 1886 until 1970, state wrongful death statutes provided the only cause of action to survivors of those killed in state territorial waters. In 1970 the Supreme Court expressly overruled *The Harrisburg* in *Moragne vs. State Marine Lines, Ltd.*, 398 U.S. at 377. Cases decided both before and after *Moragne* indicate that the *Moragne* decision should not be

construed as holding that general maritime law pre-empts state statutory remedies for those deaths.

Nevertheless, Respondents continue to assert their argument that substantive maritime law pre-empts state wrongful death statutes and provides a limited remedy for fatalities occurring *within state territorial waters*. They cite as authority the cases of *Moragne vs. State Marine Lines, Ltd., supra; Sea-Land Services, Inc. vs. Gaudet*, 414 U.S. 573 (1974), *Offshore Logistics, Inc. vs. Tallentire*, 477 U.S. 207 (1986) and *Chelentis vs. Luckenbach S.S. Co.*, 247 U.S. 372 (1918). However, none of these cases stands for the proposition that federal maritime law pre-empts state wrongful death statutory remedies, within state territorial waters.

To understand what precipitated the *Moragne* decision, it is necessary to go back over one hundred years to the decision in *The Harrisburg, supra*. In that case, this court held that maritime law did not afford a cause of action for wrongful death. From the date of *The Harrisburg* until 1920, there was no remedy for death on the high seas. For deaths within state territorial waters, the federal law accommodated the humane policies of state wrongful death statutes by allowing recovery whenever an applicable state statute favored such a recovery. Congress acted in 1920 to furnish the remedy denied by the courts for deaths beyond the jurisdiction of any state, by passing two landmark statutes, the *Death on the High Seas Act*, 46 U.S.C. § 761, as well as the *Jones Act*, 46 U.S.C. § 688. Thus, until *Moragne*, one did not have a cause of action for deaths occurring within state waters unless a state's wrongful death act provided one.

The *Moragne* case involved a widow bringing suit in state court against the owner of a vessel to recover damages for wrongful death and for pain and suffering experienced by the decedent prior to his death under the concept of negligence *and* under the concept of *unseaworthiness* of the vessel. The case was removed to federal court based upon diversity of citizenship. A third-party complaint was filed and subsequently, both the defendant and third-party defendant sought dismissal of that portion of the Petitioner's complaint that requested damages for wrongful death on the basis of

unseaworthiness. The defendants contended that maritime law did not provide a recovery for wrongful death within a state's territorial waters and that the statutory right of action for death under Florida law did not encompass unseaworthiness as a basis of liability. The lower courts all agreed, prompting the Supreme Court to grant certiorari.

The Supreme Court held that a non-statutory cause of action, similar to that provided under DOHSA, is available if a seaman's death is caused by the violation of traditional duties under maritime law, such as the duty to provide a seaworthy vessel. The *Moragne* court noted that when Congress enacted the *Death on the High Seas Act* in 1920, it intended to leave state wrongful death remedies intact. *Moragne*, 398 U.S. at 400. However, Congress did not intend to foreclose any "non-statutory federal remedies that might be found appropriate to effectuate the policy of general maritime law." *Id.* Nowhere in *Moragne* did the Supreme Court intimate that state wrongful death statutes were pre-empted by federal maritime law in this area; rather, the *Moragne* decision "merely removes the bar to access to the general maritime law." *Moragne*, 398 U.S. at 404.

If a person is injured in a *state's territorial waters*, and dies, then his survivors can recover for negligence or unseaworthiness provided that the state wrongful death statute allows recovery on such theories of liability. The *Tungus vs. Skovgaard*, 358 U.S. 588 (1959). In that case, the motor vessel TUNGUS was docked at Bayonne, New Jersey, with a cargo of coconut oil in its deep tanks. A shore-based company was employed to handle the discharge of the cargo. Because of some pump problems, Carl Skovgaard, a foreman with the shore-based company, was summoned from his home shortly after midnight to assist in the repairwork. After arriving on board, he walked through an area in which oil had been spilled, slipped and fell to his death in eight feet of hot coconut oil.

The widow sued in admiralty, alleging various causes of action, to include a cause of action under the New Jersey wrongful death act. The Supreme Court granted certiorari to consider the relationship of maritime and local law in cases of

this kind and noted the following, which is extremely important to our case:

> [A]dmiralty courts, when invoked to protect rights rooted in state law, endeavor to determine the issues in accordance with the substantive law of the State. *Garrett vs. Moore-McCormack Co.*, 317 U.S. 239, 245, 63 S.Ct. 246, 251, 87 L.Ed. 239 (1942). The policy expressed by a State Legislature in enacting a wrongful death statute is not merely that death shall give rise to a right of recovery, nor even that tortious conduct resulting in death shall be actionable, but that damages shall be recoverable when conduct of a particular kind results in death. It is incumbent upon a court enforcing that policy to enforce it all; it may not pick or choose.
>
> It is manifest, moreover, that acceptance of the respondent's argument would defeat the intent of Congress to preserve state sovereignty over deaths caused by maritime torts within the state's territorial waters. The legislative history of the Death on the High Seas Act discloses a clear congressional purpose to leave 'unimpaired the rights under state statutes as to deaths on waters within the territorial jurisdiction of the states.' S. Rep. No. 216, 66th Cong., 1st Sess. 3; H.R. Rep. No. 674, 66th Cong., 2d Sess. 3. The record of the debate in the House of Representatives preceding passage of the bill reflects deep concern that the power of the states to create actions for wrongful death in no way be affected by enactment of the federal law. 59 Cong.Rec. 4482-4486.
>
> *There is no merit to the contention that application of state law to determine rights arising from death in state territorial waters is destructive of the uniformity of federal maritime law.* Even *Southern Pacific Co. vs. Jensen*, which fathered the 'uniformity' concept, recognized that uniformity is not offended by 'the right given to recover in death cases.' 244 U.S. 205, at page 216, 37 S.Ct. 524, at page 529, 61 L.Ed. 1086. It would be an anomaly to hold that a state may create a right of action for

> death, but that it may not determine the circumstances under which that right exists. The power of a state to create such a right includes of necessity the power to determine when recovery shall be permitted and when it shall not. *Caldarola vs. Eckert*, 322 U.S. 155, 76 S.Ct. 1569, 91 L.Ed. 1968. We hold, therefore, that the Court of Appeals was correct in viewing the basic question before it as one of interpretation of the law of New Jersey. (Emphasis added). 358 U.S. at 594.

As the above quote illustrates, the record of the debate in the House of Representatives during discussion of the DOHSA bill reflected a deep concern by Congress that the power of the states to create actions for wrongful death, within their territorial waters, should in no way be affected by enactment of the federal law.

A subsequent case that discusses that same Congressional Record is *Offshore Logistics, Inc. vs. Tallentire*, 477 U.S. 207 (1986). In that case, this court discussed DOHSA in detail. Section 7 of DOHSA provides:

> The provisions of any state statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any state, or to any navigable waters in the Panama Canal Zone. 46 U.S.C. § 767.

The Supreme Court noted that the Maritime Law Association (MLA), an organization of experts in admiralty law and a prime force in the movement for a federal wrongful death remedy, drafted the bill that was enacted as DOHSA. The MLA envisioned Section 7 to be a jurisdictional saving clause which completed the statutory scheme by ensuring continued concurrent state and federal jurisdiction over wrongful death claims arising from accidents on territorial waters. After discussing the *Southern Pacific Co. vs. Jensen*, 244 U.S. 206 (1917) case, the Supreme Court stated the following:

> Although not intended to function as a substantive law saving clause, §7 incidentally ensured that state

courts exercising concurrent jurisdiction could, as under the 'saving to suitors' clause, apply such state remedies as were not inconsistent with substantive federal maritime law. It had been recognized that states could 'modify' or 'supplement' the federal maritime law by providing a wrongful death remedy enforceable in admiralty for accidents on territorial waters. *See, e.g., Western Fuel Co. vs. Garcia*, 257 U.S. 233, 42 S.Ct. 89, 66 L.Ed. 210 (1921); *Steamboat Co. vs. Chase*, 16 Wall. 522, 32 L.Ed. 369 (1873). The reach of DOHSA's substantive provisions was explicitly limited to actions arising from accidents on the high seas, see 46 U.S.C. § 761, so as to 'prevent the Act from abrogating by its own force, the state remedies then available in state waters.' *Mobil Oil Corp. vs. Higginbotham*, 436 U.S. 617, at 621-622, 98 S.Ct., at 2013. Thus, because DOHSA by its terms extended only to the high seas and therefore was thought not to displace these state remedies on territorial waters, see *Moragne vs. States Marine Lines, Inc.*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970), §7, as originally proposed, ensured that the Act saved to survivors of those killed on territorial waters the ability to pursue a state wrongful death remedy in state court. Although the congressional debates on §7 were exceedingly confused and often ill-informed, the remarks of the proponents of the bill amply support the theory that §7 originally was intended to preserve the state courts' jurisdiction to provide wrongful death remedies under state law for fatalities on territorial waters. In the debate, the discussion focused almost exclusively on the intended jurisdictional effects of that section. See 59 Cong.Rec. 4482-4485 (1920). The proponents of §7 before its amendment expressed their resolve to save to suitors the benefits of state judicial, and, derivatively, legislative jurisdiction within state territorial waters. See, *e.g., id.*, at 4482 (remarks of Rep. Montague); *id.*, at 4483 (remarks of Rep. Montague)('the territorial waters of the states shall be retained within the jurisdiction and sovereignty of

the states and their courts'); *ibid.* (remarks of Rep. Montague)(§7, as originally drafted, was 'put in out of abundant caution, to calm the minds of those who think that rights within the territorial waters will be usurped by the national law'). They also, however, stated their firm intent to make exclusive federal jurisdiction over wrongful death actions arising on the high seas by restricting the scope of §7 to territorial waters. See *e.g.*, *ibid.*, (remarks of Rep. Moore) ('The purpose . . . is to give exclusive jurisdiction to the admiralty courts where the accident occurs on the high seas'). Thus, they asserted that the effect of §7, as originally drafted, would be to confer exclusive jurisdiction on the federal admiralty courts for causes of action arising on the high seas. See, *e.g.*, *ibid.*, (remarks of Rep. Sanders); *id.*, at 4484 (remarks of Rep. Volstead) ('This bill clearly leaves the jurisdiction exclusive in the federal court outside the 3-mile limit'). It is against this backdrop that Representative Mann introduced his amendment to §7. To the extent that Representative Mann's specific intent in introducing his amendment can be deciphered from his contribution to the debate's confusion, his purpose appears at least consistent with the idea that §7 would serve as a jurisdictional saving clause, as his principal concern seems to have been the recognition of state court jurisdiction over DOHSA claims. Representative Mann had, in debates over an earlier draft of DOHSA, expressed his belief that federal admiralty courts had exclusive jurisdiction over accidents occurring on the high seas. See 51 Cong.Rec. 1928 (1914). In those debates, his principal concern was that state courts would continue to enjoy concurrent jurisdiction with federal admiralty courts over causes of action arising on the Great Lakes. *Ibid.* During the debates on the bill that became DOHSA, Representative Mann continued to express his concern regarding the jurisdiction of state courts over death claims growing out of accidents on territorial waters and the Great Lakes. See, *e.g.*, 59 Cong.Rec. 4483 (1920). However, he also argued in these later

> debates that if state courts had ever previously exercised jurisdiction over death claims arising on the high seas, they should be permitted to continue to do so. See, *e.g.*, *ibid.* ('Though I do not know, I suppose if a man is injured on the high seas . . . and he can get service on the defendant, as a result of that injury, he can bring suit'); *id.*, at 4484 ('I remember this bill very distinctly in previous Congresses, and . . . I was under the impression that the bill was not intended to take away any jurisdiction which can now be exercised by any state court'); *ibid.* ('If this act as originally drawn by the admiralty lawyers was intended for the purpose of taking away jurisdiction now conferred by state statutes, it ought to be critically examined'). By suggesting the deletion of the language limiting the jurisdictional saving clause's scope only to territorial waters, Representative Mann intended to ensure that state courts could also serve as a forum for the adjudication of wrongful death actions arising out of accidents on the high seas. See, *e.g.*, *ibid.* (under Rep. Mann's amendment, where a state gives a cause of action and a death occurred on the high seas, 'there would be concurrent jurisdiction'); *id.* at 4485 (if §7 were amended as he suggested, 'the Act will not take away any jurisdiction conferred now by the states'). We conclude that Representative Mann's amendment extended the jurisdictional saving clause to the high seas but in doing so, it did not implicitly sanction the operation of state wrongful death statutes on the high seas in the same manner as the saving clause did in territorial waters. At page 224, 225.

Petitioners assert that the *Tallentire* case is correctly analyzed in the treatise written by Wright, Miller & Cooper, *Jurisdiction*, § 3672 as follows:

> Despite the Court's stated solicitude with regard to forum choice for survivors of those killed on the high seas, the actual holding of *Offshore Logistics*, which addressed a conflict that had developed among the Courts of Appeals as to the substantive effect of the Death on the High Seas Act, resolved

> that conflict against the interests of most survivors. Prior to *Offshore Logistics*, several lower courts had held that the first sentence of Section 7 of the Act preserved not only concurrent jurisdiction, but also any remedies provided by the state wrongful death statutes, many of which, unlike the federal statute, provide for non-pecuniary losses. Indeed, a literal reading of the statute, which states that it shall not affect the provisions of any state statute 'giving or regulating rights of action or remedies for death' would appear to support this view. Nonetheless, in *Offshore Logistics* the Court held that when an accident falls within the provisions of the Act, state wrongful death statutes are pre-empted. Thus, although survivors of a person killed in an accident on the high seas have a choice of forum, they may seek only the limited recovery provided by the Death on the High Seas Act. *If the same accident occurs within a marine league from shore, where the Death on the High Seas Act has no effect, the survivors can recover damages under the state wrongful death statute, including, when provided, reimbursement for non-economic losses.* (Emphasis added).

Respondents argue that §7 requires that federal maritime law be applied to the exclusion of state remedies in all maritime death cases, even in cases arising out of accidents within state territorial waters. However, a careful reading of the *Tallentire* decision shows that the Supreme Court rejected that argument, holding that pre-emption applies *only* to death in cases arising on the high seas (DOHSA cases). The *Tallentire* court noted that as originally drafted, §7 ensured that state law remedies were available in state courts where tortious deaths occurred in state territorial waters. However, the amended version of §7 "did not implicitly sanction the operation of state wrongful death statutes on the high seas in the same manner as the saving clause did in territorial waters." *Tallentire* at 225. Clearly the Supreme Court felt that in DOHSA cases §7 operates only as a jurisdictional saving clause, whereas for deaths occurring within territorial waters, §7 preserves the state remedy as well as state jurisdiction.

Therefore, under the reasoning of *Tallentire*, the Texas Supreme Court incorrectly interpreted this clause.

The Supreme Court's reasoning in *Tallentire* is sound and reflects the historical concept that states have broad rights to regulate conduct within their territorial waters. In *Just vs. Chambers*, 312 U.S. 383 (1941), the Supreme Court recognized that states have broad powers to establish rights and liabilities affecting maritime affairs within their borders when state action "does not contravene any acts of Congress, nor work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony and uniformity in its international and interstate relations." As the Supreme Court further stated in *Romero vs. International Terminal Operating Co.*, 358 U.S. 354, 373, (1959):

> It is true that state law must yield to meet the uniform federal maritime law when this court finds inroads on a harmonious system. But this limitation still leaves this state a wide scope. State created liens are enforced in admiralty state remedies for wrongful death and state statutes providing for the survival of actions, both historically absent from the relief offered by the admiralty, have been upheld when applied to maritime causes of action. Federal courts have enforced these statutes . . . Thus if one thing is clear, it is that the source of law in saving-clause actions cannot be described in absolute terms. Maritime law is not a monistic system. State and federal governments jointly exert regulatory powers today as they have played joint roles in the development of maritime law throughout our history.

Nothing in *Moragne* or *Tallentire* renders the above reasoning obsolete.

In *Moragne*, this court did not overrule the *Tungus*, but instead overruled *The Harrisburg*. There, after discussing the legislative history of the passage of DOHSA and the *Jones Act*, the court stated the following:

> Read in light of the state of maritime law in 1920, we believe this legislative history indicates that

> Congress intended to ensure the continued availability of a remedy, historically provided by the states, for deaths in territorial waters; its failure to extend the Act to cover such deaths primarily reflected the lack of necessity for coverage by a federal statute, rather than an affirmative desire to insulate such deaths from the benefits of any federal remedy that might be available independently of the Act. The void that existed in maritime law up until 1920 was the absence of any remedy for wrongful death on the high seas. Congress, in acting to fill that void, legislated only to the three-mile limit because that was the extent of the problem. The express provision that state remedies in territorial waters were not disturbed by the Act ensured that Congress' solution of one problem would not create another by inviting the courts to find that the Act pre-empted the entire field, destroying the state remedies that had previously existed.
>
> The beneficiaries of persons meeting death on territorial waters did not suffer at that time from being excluded from the coverage of the Act. To the contrary, the state remedies that were left undisturbed not only were familiar but also may actually have been more generous than the remedy provided by the new Act. 398 U.S. at 397.

On the last page of the *Moragne* opinion (398 U.S. at 409), the Supreme Court noted that both DOHSA and the numerous state wrongful death acts had been implemented with success for decades. The effect of the *Moragne* decision was to give survivors a cause of action for unseaworthiness under the federal maritime law, as well as for negligence under state wrongful death statutes. State sovereignty interests in applying their death statutes still outweigh the need for complete uniformity in federal maritime law, and Petitioners' argument to the contrary is unsupported in the case law.

Respondents cite the *Sea-Land Services, Inc. vs. Gaudet*, 414 U.S. 573 (1974) case as authority for the proposition that damages for mental anguish cannot be recovered for a wrongful death cause for action in a maritime setting. However, as

should be abundantly clear by this point, such is the situation only when the plaintiff brings a cause of action solely under the general federal maritime law, rather than a specific state wrongful death statute. It would appear that the cause of action created by *Moragne* was intended only to fill that narrow gap where a maritime fatality occurred in state territorial waters, but when the state did *not* recognize the concept of unseaworthiness. In reading the entire *Gaudet* case, it is clear that the *Moragne* decision should be read as filling a narrow gap, and does not attempt to usurp the powers of the various states through their wrongful death statutes.

Respondents cite four circuit court cases for the proposition that *Moragne* eliminated state law causes of action for deaths in territorial waters: *Lyon vs. The Ranger III*, 858 F.2d 22, 27 (1st Cir. 1988); *Nelson vs. United States*, 639 F.2d 469 (9th Cir. 1980); *Matter of S/S Helena*, 592 F.2d 744 (5th Cir. 1976); *Lamp vs. United States Steel Corp.*, 436 F.2d 1256, 1279 (6th Cir. 1970), *cert. denied* 409 U.S. 987, 91 S.Ct. 1649; *reh'g denied* 403 U.S. 924, 403 U.S. 940, 91 S.Ct. 2246 (1971). However, all of these cases involve third-party actions brought by *Jones Act* seamen in admiralty courts. Just as federal courts have an interest in assuring DOHSA cases are administered uniformly, they may also have such an interest in cases brought by *Jones Act* seamen. However, the case at bar does not present the issue of whether federal law preempts state law in such cases. Respondents ask this Court to overrule a long line of precedent which allows states to provide a remedy for deaths occurring in their territorial waters based on cases with facts inapposite to those in the present case.

It should be noted that *Lyon vs. The Ranger III*, 858 F.2d 22 (1st Cir. 1988) does not stand for the proposition for which it is cited by Respondents. The *Lyon* case does not discuss whether federal law should pre-empt a state's wrongful death statute. In fact, it does not even refer to the *Moragne* decision. In *Lyon* the court decided that Massachusetts state law should determine the definition of "joint enterprise in a wrongful death case in which the accident took place one-

quarter (1/4) of a mile from the Massachusetts coast. *Lyon*, 858 F.2d at 27.

The Texas Supreme Court also relied on the *Admiralty Extension Act of 1948*, 46 U.S.C. § 740 as authority for holding that general maritime law pre-empted the state wrongful death and survival statutes.

The Admiralty Extension Act, *supra*, was passed by Congress to permit recovery in admiralty where a ship caused damages to persons or property on land and to overrule prior Supreme Court cases that refused to permit such a recovery. *Heim v. City of New York*, 442 F.Supp. 35 (D.C.N.Y. 1977); *Adams v. Harris County, Texas*, 316 F.Supp. 938, reversed on other grounds, 452 F.2d 994, cert. denied, 92 S.Ct. 2414, 406 U.S. 968, 32 L.Ed.2d 667 (1970).

The Admiralty Extension Act does not pre-empt state law in situations involving shoreside injuries on navigable waters. *Askew v. American Waterways Operators*, 411 U.S.325 (1973). In *Askew v. American Waterways Operators, supra*, the United States Supreme Court interpreted the Admiralty Extension Act of 1948 and held that the Florida Pollution Statute did not encroach upon the Federal Pollution Law under the Admiralty Extension Act where the pollution occurred in state territorial waters. The Court stated at page 337 of its Opinion:

> "And so, in the absence of federal preemption and any fatal conflict between the statutory schemes, the issue comes down to whether a State constitutionally may exercise its police power respecting maritime activities concurrently with the Federal Government.
>
> The main barriers found by the District Court to the Florida Act are Southern Pacific Co. v. Jensen, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086, and its progeny. *Jensen* held that a maritime worker on a vessel in navigable waters could not constitutionally receive an award under New York's workmen's compensation law, because the remedy in admiralty was exclusive. Later, in Knickerbocker Ice Co. v. Stewart, 253 U.S.149, 40 S.Ct.438, 64 L.Ed.834, after Congress expressly allowed the

States in such cases to grant a remedy, the Court held that Congress had no such power.

But those decisions have been limited by subsequent holdings of this Court. As stated by Mr. Justice Frankfurter in Romero v. International Terminal Operating Co., 358 U.S.354, 373, 79 S.Ct.468, 480, 3 L.Ed.368, *Jensen* and its progeny mark isolated instances where 'state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system.' Mr. Justice Frankfurter added, however: 'But this limitation still leaves the States a wide scope. State-created liens are enforced in admiralty. *State remedies for wrongful death and state statutes providing for the survival of actions, both historically absent from the relief offered by the admiralty, have been upheld when applied to maritime causes of action. Federal courts have enforced these statutes.* State rules for the partition and sale of ships, state laws governing the specific performance of arbitration agreements, state laws regulating the effect of a breach of warranty under contracts of maritime insurance – all these laws and others have been accepted as rules of decision in admiralty cases, even, at times, when they conflicted with a rule of maritime law which did not require uniformity.' " *Id.*, at 373-374, 79 S.Ct., at 480-481. (Emphasis added)

This case was decided fifty-three (53) years after the enactment of the *Death on the High Seas Act*, 46 U.S.C. 761 *et seq.* (1920) and twenty five (25) years after enactment of the Admiralty Extension Act, *supra*, and the Supreme Court recognized that state wrongful death statutes were still applicable in state territorial waters.

The Supreme Court further stated in *Askew, supra* at page 344:

"But we decline to move the *Jensen* line of cases shoreward to oust state law from any situations involving shoreside injuries by ships on navigable waters. The Admiralty Extension Act does not preempt state law in those situations. . . . "

In *Just v. Chambers*, 312 U.S.383 (1941), a yacht was cruising in the territorial waters of the State of Florida, and carbon monoxide gas released aboard the vessel caused injuries to the passengers. A limitation of liability action was filed by the owner of the vessel in the United States District Court and claims were filed by the passengers in this proceeding. The owner of the vessel died while the case was pending, and the issue of survival of the causes of action against his estate was presented to the Court.

The Court held that even though the causes of action were clearly maritime torts, since the injuries occurred in the state territorial waters of Florida, the Florida statute allowing survival of causes of action against the decedent prevailed. The Court stated at page 691 of its Opinion:

> "[12,13] Whether the particular rule now invoked is so securely based in our maritime law that a different one can be established only by legislation and not by the exercise of the judicial power responding to present standards of justice, we need not now consider. For, while the injury occurred on navigable waters, these were within the limits of Florida whose legislation provided that the cause of action should survive. And it is not a principle of our maritime law that a court of admiralty must invariably refuse to recognize and enforce a liability which the State has established in dealing with a maritime subject. On the contrary, there are numerous instances in which the general maritime law has been modified or supplemented by state action, as e.g. in creating liens for repairs or supplies furnished to a vessel in her home port. The Lottawanna, 21 Wall.558, 580, 22 L.Ed.654; The J. E. Rumbell, 148 U.S.1, 12, 13 S.Ct.498, 500, 37 L.Ed.345. With respect to maritime torts we have held that the State may modify or supplement the maritime law by creating liability which a court of admiralty will recognize and enforce when the state action is not hostile to the characteristic features of the maritime law or inconsistent with federal legislation. The City of Norwalk, D.C., 55 F.98; Western Fuel Company v. Garcia, 257 U.S.233, 242, 42 S.Ct.89, 90, 66 L.Ed.210; Great Lakes Dredge & Dock Company v. Kierejewski, 261 U.S.479, 43

S.Ct.418, 67 L.Ed.756; Vancouver Steamship Co. v. Rice, 288 U.S.445, 53 S.Ct.420, 77 L.Ed.885."

In *Western Fuel Company v. Garcia*, 257 U.S.233 (1921), suit was brought for the death of a stevedore killed in the hold of a vessel anchored in San Francisco Bay within the territorial waters of the State of California.

In upholding the cause of action for wrongful death under the laws of the State of California, the Court stated at page 242 of its Opinion:

> "As the logical result of prior decisions we think it follows that where death upon such waters follows from a maritime tort committed on navigable waters within a state whose statutes give a right of action on account of death by wrongful act, the admiralty courts will entertain a libel in personam for the damages sustained by those to whom such right is given. The subject is maritime and local in character and the specified modification of or supplement to the rule applied in admiralty courts when following the common law, will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations. Southern Pacific Co. v. Jensen, supra."

The Court also applied the statute of limitations of the State of California of one (1) year for wrongful death and denied the claim.

The Court in *Western Fuel Company v. Garcia, supra*, at page 243 of its Opinion, referred to the newly enacted Death on the High Seas Act, 46 U.S.C.761, et seq., (1920) and pointed out that it only applied to deaths occurring one (1) marine league from shore.

In *Levinson v. Deupree*, 345 U.S.648 (1953), a cause of action for wrongful death of a decedent killed in the Ohio River within the territorial waters of the State of Kentucky was brought in the United States District Court of Kentucky against the owners and operators of the vessel.

The Supreme Court held that where a maritime tort is committed upon the navigable waters within a state, the state wrongful death statutes apply, citing *Western Fuel Company v. Garcia, supra*, as authority for its decision.

The Court distinctly recognized that it was an admiralty case, not a diversity case. It applied Federal Rules of Procedure, but applied Kentucky substantive law.

Although *Western Fuel Company v. Garcia, supra, Levinson v. Deupree, supra,* and *Just v. Chambers, supra,* were decided before *Moragne v. States Marines Lines Inc.*, 398 U.S.375 (1970), and the holding of the Supreme Court in *Offshore Logistics, Inc. v. Tallentire*, 477 U.S.207 (1986), Justice O'Connor, who wrote the majority Opinion in *Offshore Logistics, Inc. v. Tallentire, supra,* specifically noted the vitality of the decision in *Western Fuel Company v. Garcia, supra.*

It was finally concluded in *Offshore Logistics, Inc. v. Tallentire, supra,* that §7 of the Death on the High Seas Act, *supra,* was only a jurisdictional savings clause, and did not allow state remedies for wrongful death to be pursued where death occurred more than one (1) marine league from shore. The Court did recognize that where persons were killed in state territorial waters, they were allowed to pursue state wrongful death remedies in the state court if they so desired.

It is respectfully submitted that based upon the decisions of the United States Supreme Court addressing the specific issue of pre-emption, the Texas Wrongful Death Statute and the Texas Survival Statute, *supra,* have not been pre-empted by either federal legislation or federal case law, and the Texas Survival Statute, *supra,* clearly allows recovery for mental anguish suffered by the surviving parents of a decedent son and loss of society caused by the death of their son, Dau Van Tran.

C. The Texas Supreme Court Erred In Holding That Damages For Loss Of Society Are Not Recoverable Under General Maritime Law By The Survivors Of A Person Killed In State Territorial Waters Who Was Not A Seaman, Longshoreman Nor A Member Of A Crew Of A Vessel, But Was A Mere Volunteer Killed On A Dock By The Wave Of A Passing Vessel.

Assuming arguendo that the federal maritime law pre-empts state law under the circumstances of this case, federal maritime law allows recovery for loss of society by the survivors of a decedent where the death occurs in state territorial waters.

The Supreme Court of Texas cites *Miles v. Apex Marine Corp.*, 59 U.S.L.W. 4001 (November 6, 1990) as authority for precluding recovery for loss of society. The *Miles* case involved a *seaman* killed while his ship was docked in an American port. The Court allowed recovery for his death under general maritime law. The United States Supreme Court, in the *Miles* case, distinguished between cases involving seamen and non-seamen and territorial and non-territorial waters. The Supreme Court stated that in *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974), a longshoreman's widow could recover for loss of society caused by the death of her husband since he was killed in state territorial waters. In *Mobil Oil Corporation v. Higginbotham*, 436 U.S. 618 (1978), the Court held no recovery for loss of society where the death occurred on the high seas, since the Death on the High Seas Act, 46 U.S.C. §762 expressly forbid recovery for non-pecuniary losses.

The Supreme Court, in the *Miles* case, *supra*, stated that since under the *Jones Act*, there is no recovery allowed for loss of society for death of a seaman, it would not allow recovery for loss of society by the survivors of a seaman under *general maritime law*.

That is clearly not the case here since decedent was not a seaman.

In American Export Lines v. Galvez, 446 U.S.274 (1980), the United States Supreme Court, citing *Sea-Land Services v. Gaudet, supra*, as authority, recognized loss of society (loss of consortium) even where there was a non-fatal injury in territorial waters.

In *Sweeney v. Car-Puter International Corporation*, 521 F.Supp. 276 (D.C.S.C. 1981), the Court upheld a husband's recovery for loss of society caused by *injuries* to his wife in a maritime cause of action, citing *Sea-Land Services v. Gaudet, supra*, and *American Export Lines v. Galvez, supra*, as authority for their decision.

In *Complaint of Patten-Tully Transportation Company*, 797 F.2d 206 (5th Cir. 1986), a seaman died in the territorial waters of Mississippi, and his family sued under general maritime law to recover for loss of society among other damages. The Court allowed the brother and sister to recover for loss of society as well as other members of the family, citing *Sea-Land Services, Inc. v. Gaudet, supra*, as authority for their decision.

In *Bubla v. Bradshaw*, 795 F.2d 349 (4th Cir. 1986), the Court allowed recovery by a widow for loss of society of a marine surveyor killed aboard a vessel in state territorial waters, citing *Sea-Land Services, Inc. v. Gaudet, supra,* as authority.

In *Moore v. Lillebo*, 722 SW 2d, 683 (Tex. 1986), the Texas Supreme Court, in allowing recovery by the parents of a deceased son for loss of society, cited *Sea-Land Services, Inc. v. Gaudet, supra,* for its reasoning in distinguishing recovery for mental anguish from loss of society, apparently recognizing that in Sea-Land Services, Inc. v. Gaudet, supra, there was no recovery for mental anguish in that case, but there was recovery for loss of society.

Respondents respectfully submit that this Court erred in holding that loss of society could not be recovered under general maritime law because the decedent, a non-seaman, was killed in the territorial waters of the State of Texas.

D. The Texas Supreme Court Erred In Holding That A Defendant In A Wrongful Death Case Arising Out Of The Death Of A Person In State Territorial Waters Who Was Not A Seaman, Longshoreman Nor A Member Of A Crew Of A Vessel, But Was A Mere Volunteer Killed On A Dock By The Wave Of A Passing Vessel, Is Not Required To Plead The Applicability Of General Maritime Law As An Affirmative Defense In Order To Invoke General Maritime Law Instead Of The State Wrongful Death And Survival Statutes.

The Texas Supreme Court held that general maritime law controls the disposition of this case despite the fact that Texaco did not plead maritime law nor object to evidence of damages inconsistent with maritime law. Such a ruling is contrary to Rule 94, Texas Rules of Civil Procedure, and the very recent case of *Gorman vs. Life Insurance Company of North America*, Vol 34, *Texas Supreme Court Journal*, page 457.

In *Gorman*, the heart of the dispute was whether the ERISA pre-emption implicated the subject-matter jurisdiction of the court or merely affected which law was to be used in the case.

As the court in *Gorman* stated at page 458, "A pre-emption argument that affects the choice of forum rather than the choice of law is not waivable and can be raised for the first time on appeal."

The Texas Supreme Court in *Gorman* went on to note that state courts and federal courts had concurrent jurisdiction of actions by a beneficiary in three areas. Any other civil ERISA action is within the exclusive jurisdiction of the federal courts. If a state-law cause of action falls within the scope of the three areas mentioned, state courts have concurrent jurisdiction. An assertion of ERISA pre-emption in such a case would affect only the choice of law, not the choice of forum.

The Texas Supreme Court, (after reviewing a number of federal court decisions holding that ERISA pre-emption, when it operates to displace state law in favor of federal law, is waived if not timely asserted as an affirmative defense). held as follows:

> "We are in accord and hold that, where ERISA's pre-emptive effect would result only in a change of the applicable law, pre-emption is an affirmative defense which must be set forth in the Defendant's answer or it is waived." At pages 459-460.

E. The Texas Supreme Court Erred In Holding That A Defendant In A Wrongful Death Case Arising Out Of The Death Of A Person In State Territorial Waters, Who Was Not A Seaman, Longshoreman Nor Member Of A Crew Of A Vessel, Can Raise The Issue Of The Awarding Of Damages For Loss Of Society For The First Time In Its Writ Of Error To The Supreme Court Of Texas, Having Failed To Do So In Its Appeal To An Inferior Court.

Judgment in this case was entered by the trial court in September of 1988. In Respondent Texaco's brief to the Court of Appeals, filed in February of 1989, only seven points of error were raised: (1) no evidence of negligence; (2) no evidence of survival damages; (3) that it was error to strike the Defendants' experts; (4) that is was error to allow mental anguish damages; (5) that it was error to award pre-judgment interest; (6) that the amount of damages for loss of society was against the great weight of the

evidence; and (7) that the findings of negligence and proximate cause were against the great weight of the evidence.

No point was raised that Petitioners could not recover for loss of society.

In the Respondent's application for writ of error to the Texas Supreme Court, filed in October of 1989, only the first five (5) points listed above were brought forward as error.

No point was raised that Petitioners could not recover for loss of society.

In Respondent Texaco's petition for a writ of certiorari to the United States Supreme Court, the Petitioners complained that federal maritime law governed the claims against Texaco and pre-empted state law and that no mental anguish damages or pre-judgment interest should be recovered by Petitioner, Tran.

No point was raised that Petitioners could not recover for loss of society.

Once the case was remanded to the Court of Appeals for the Ninth Supreme Judicial District of Texas to consider *Sisson vs. Ruby*, 497 U.S. ___ (1990), no point was raised by Respondents that Petitioners could not recover for loss of society.

And in Respondent Texaco's *motions* for rehearing in the Court of Appeals, no assignment of error was *ever* made as to the loss of society damages. Thus, under *Aviation Office of America vs. Alexander & Alexander of Texas, Inc.*, 751 S.W.2d 179 (Tex. 1988), failure to assign a point as error in a motion for rehearing constitutes waiver of said point.

As stated in *Oil Field Haulers Association vs. Railroad Commission*, 381 S.W.2d 183 (Tex. 1964):

> "[8] This Court has jurisdiction of an application for writ of error which is properly prepared and timely filed after the overruling of a motion for rehearing in a Court of Civil Appeals, but it has no jurisdiction to consider points of error contained in the application unless points have been properly preserved in the motion for rehearing." 381 S.W.2d at 189.

Additionally, in its second application for writ of error to the Supreme Court of Texas, filed in October of 1990,

Respondent Texaco again only complained about mental anguish damages and pre-judgment interest. No point was raised that the Petitioner, Tran could not recover for loss of society until an amended petition for writ of error was filed.

Since the issue as to damages for loss of society does not involve subject matter jurisdiction (i.e. choice of forum). it *cannot* be raised for the first time at this stage of the appeal. It has been waived. Thus, it was error for the Texas Supreme Court to reverse and render as to the damages for loss of society.

F. The Supreme Court Of Texas Erred In Accepting The Appeal Of This Case From The Court Of Appeals Of The Ninth Supreme Judicial District Because The Proper Court To Which Appeal Should Have Been Made Was The Supreme Court Of The United States.

Petitioners respectfully submit that the Supreme Court of Texas has erred as a matter of law in reversing the decision of the Court of Appeals for the Ninth Supreme Judicial District of Texas and rendering this case to the 60th Judicial District Court because the Texas Supreme Court had no jurisdiction of an appeal from a decision of the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas since this case was remanded to the Court of Civil Appeals by the Supreme Court of the United States on a single point of federal law, that is, whether or not a maritime tort had occurred, and this appeal should have been directly to the Supreme Court of the United States and not to the Supreme Court of Texas.

Petitioners are unable to cite any authority for this proposition. However, Petitioners would point out to the Court that the issue of pre-emption of the Texas Wrongful Death Statute and the Texas Survival Statute had previously been submitted to the Supreme Court of Texas by Respondent Texaco and the Texas Supreme Court denied their Writ of Error on the very point that is now being raised in this case. Therefore, it would seem that the appeal from the decision of the Court of Appeals for the Ninth Supreme Judicial District should have been directly back to the United States Supreme Court

answering the question that they posed to the Court of Appeals, that is, to determine whether or not they now felt that this was not a maritime tort in light of the decision of *Sisson vs. Ruby*, 497 U.S. ___ (1990).

CONCLUSION AND PRAYER FOR RELIEF

The Texas Supreme Court has erroneously held that general maritime law pre-empts the Texas Wrongful Death and Survival Statutes under the facts of this case. Even if this court holds that general maritime law does pre-empt the Texas Wrongful Death and Survival Statutes, this court should reverse and remand the decision of the Texas Supreme Court disallowing recovery by Petitioners of damages for loss of society because this element of damages is recoverable under general maritime law and Respondent Texaco has waived their right to complain of the awarding of such damages.

Petitioners pray that this court reverse the judgment of the Texas Supreme Court and reinstate the judgment of the Court of Appeals for the Ninth Supreme Judicial District of Texas upholding the judgment of the trial court or, in the alternative, that this court reverse the judgment of the Texas Supreme Court with instructions to the courts to reinstate the judgment of the trial court and Court of Appeals for the Ninth Supreme Judicial District of Texas allowing recovery for loss of society.

Respectfully submitted,

MOORE, LANDREY, GARTH, & JONES
285 Liberty, Suite 1900
Beaumont, Texas 77701
(409) 835-3891
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Jon B. Burmeister
George Sladczyk, Jr.

APPENDIX A

IN THE SUPREME COURT OF TEXAS

NO. D - 0473

TEXACO REFINING and MARKETING, INC. and TEXACO MARINE SERVICES, INC.	§	FROM JEFFERSON COUNTY
Petitioners	§	NINTH DISTRICT
v.	§	
ESTATE of DAU VAN TRAN, et. al.	§	
Respondents	§	

OPINION

Dau Van Tran was crushed to death when a large wave, purportedly caused by the tanker TEXACO CALIFORNIA's excessive speed, washed ashore just as he exited the water between a dock barge and a shrimp boat. Suit was filed against the tanker's owners and operators, Texaco Refining and Marketing, Inc. and Texaco Marine Services, Inc. ("Texaco"), under the Texas Wrongful Death and Survivorship Statutes[1]. The suit also alleged Texaco violated article 29 of the Inland Rules, by failing to practice good seamanship. Texaco named the owner/operator of the shrimp boat and dock involved, Farmer Boy's Catfish Kitchens International, Inc., as a third party

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[1] Texas Wrongful Death Statute, Tex. Civ. Prac. & Rem. Code Ann., §§ 71.001 - .002 (Vernon 1986); Texas Survival Statute, Tex. Civ. Prac. & Rem. Code Ann. § 71.021 (Vernon 1986).

defendant. Plaintiffs alleged negligence and violations of general maritime law against the third party.

The trial court rendered judgment against Texaco, exonerating the other defendant. The Beaumont Court of Appeals affirmed. 777 S.W.2d 783, writ denied. Subsequently, the U.S. Supreme Court granted writ of certiorari, vacated the judgment and remanded the cause to the court of appeals for further reconsideration in light of *Sisson v. Ruby*, 497 U.S. ___ (1990). On remand, the court of appeals reaffirmed its original decision. 795 S.W.2d 870. Mindful of the U.S. Supreme Court's remand order, and after a review of applicable law, we conclude the court of appeals erred in its conclusions. Accordingly, we will reverse.

Dau Van Tran was neither a seaman nor a longshoreman. He was a "good samaritan" who stopped to help the elderly captain of a shrimp boat free his propeller. He was against the dock barge between two tires when the wave washed ashore, throwing the shrimp boat against the dock crushing him. The facts and circumstances of this case remove it from statutes protecting classes of individuals under traditional maritime law: the Jones Act, 46 U.S.C. § 688, which protects seamen; the Death on the High Seas Act, DOHSA, 46 U.S.C. § 761 et seq., applicable to deaths of persons occurring on the high seas beyond a maritime league from shore; and the Longshoreman's and Harbor Workers' Compensation Act, 33 U.S.C. § 901, et seq., giving longshoremen worker's compensation benefits. General maritime jurisdiction would be appropriate, however, under the Admiralty Extension Act of 1948, 46 U.S.C. § 740: "[t]he admiralty and maritime jurisdiction of the United States shall extend to and include all cases of

damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land." The Admiralty Extension Act's purpose "was to prevent individuals from falling through the cracks of state law and admiralty jurisdiction". *Kahn v. Gates Constr. Corp.*, 480 N.Y.S.2d 351, 355 (N.Y. App. Div. 1984). Texaco argues the trial court incorrectly awarded damages to the plaintiffs for mental anguish, loss of society, and prejudgment interest, none of which are permitted under general maritime law. Damages for the mental anguish suffered by the beneficiaries "are not compensable under the maritime wrongful-death remedy," *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 585 n.17 (1974). Loss of society is not recoverable under general maritime law, *Miles v. Apex Marine*, 59 U.S.L.W. 4001, 4005 (November 6, 1990). Contrary to Texaco's assertions, however, an award of prejudgment interest in an admiralty case is within the sound discretion of the court. *Pickle v. International Oilfield Divers, Inc.*, 791 F.2d 1237, 1240 (5th Cir. 1986), cert. denied, 479 U.S. 1059 (1987). "In fact, generally in maritime law, prejudgment interest should be awarded." *Curry v. Fluor Drilling*, 715 F.2d 893, 896 (5th Cir. 1983).

The U.S. Supreme Court remanded this cause following its decision in *Sisson v. Ruby, supra*. *Sisson* sets out a two-part test to determine maritime jurisdiction's appropriateness: first, a court must determine the event's potentially disruptive impact on maritime commerce; second, the general conduct surrounding the incident must be substantially related to traditional maritime activity. Examining the first requirement of the *Sisson* test, we consider the potentially disruptive impact of the incident

on maritime commerce – whether it poses a significant hazard to commercial vessels. Here a ship allegedly navigating at too great a speed caused a large wave which injured someone along the shoreline. This activity poses a threat to any person or thing in close proximity to the shoreline. This would not appear to constitute a potential disruption to maritime activity or commercial vessels. It could be argued, however, that such an event would potentially endanger passing vessels and docked commercial ships with their attendant dockside activities. Texaco also presented evidence at trial that the TEXACO CALIFORNIA's speed was necessary to protect the ship, apparently to compensate for a strong cross-current which could have grounded the ship. The second part of the *Sisson* test concerns whether the conduct involved was substantially related to traditional maritime activity. The general conduct giving rise to the incident was the passage of the vessel through the ship channel, and is clearly substantially related to traditional maritime activity. Moreover, during oral arguments both sides conceded a maritime tort had occurred.

Where applicable *and* properly invoked, general maritime law preempts state causes of action and remedies, consistent with the longstanding desire of Congress and the judiciary to achieve uniformity in the exercise of admiralty jurisdiction pursuant to the U.S. Constitution, art. 3, § 2, cl.1. *See Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 676-677 (1982). The "savings to suitors" clause of 28 U.S.C. 1333(1) permits state courts to adjudicate maritime actions "constrained by the 'reverse-Erie' doctrine which requires that substantive remedies afforded by States conform to governing federal maritime standards." Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 223 (1986).

Where general maritime law is property invoked by pleadings and litigated at trial, a trial court's failure to award damages consistent with maritime law is clearly reversible error. Plaintiff's live pleadings refer to the Inland Water Rules and failure to practice good seamanship. Texaco did not plead maritime law nor object to evidence of damages inconsistent with maritime law, but did raise it in its fourteenth proposed finding of fact and conclusion of law: "The case at bar is governed by the principles of general maritime law." Maritime remedy constraints were again raised in Texaco's motion for new trial. Moreover, one of the plaintiffs' proposed findings of fact states: "The TEXACO CALIFORNIA failed to observe the rules of the road and the rules of good seamanship on the day in question." In response to Texaco's motion for new trial, the plaintiffs filed amended findings of fact. Acknowledging Texaco's plea that the court not award mental anguish damages inconsistent with maritime law remedies, plaintiffs asked the court to "reconsider its award for loss of companionship, affection and society, both past and future, for both the mother and father."

We conclude this was sufficient notice to the trial court to invoke general maritime law and its limited remedies. Accordingly, we reverse the judgment of the court of appeals and remand this cause to the trial court for rendition of judgment consistent with this opinion.

BOB GAMMAGE,

Justice

OPINION DELIVERED: April 24, 1991.

THE SUPREME COURT OF TEXAS

No. D-0473

TEXACO REFINING AND MARKETING, INC. AND TEXACO MARINE SERVICES, INC.,	§	From JEFFERSON County,
Petitioners	§	NINTH District.
vs.	§	
ESTATE OF DAU VAN TRAN ET AL.,	§	
Respondents	§	

JUDGMENT

THE SUPREME COURT OF TEXAS, having heard this cause on writ of error to the Court of Appeals for the Ninth District, and having considered the appellate record and the argument of counsel, is of the opinion that the judgment of the court of appeals should be reversed.

IT IS THEREFORE ORDERED, in accordance with the Court's opinion, that:

1) The judgment of the court of appeals is reversed;

2) The cause is remanded to the District Court of Jefferson County, Texas, for rendition of judgment consistent with this opinion;

3) Texaco Refining and Marketing, Inc. and Texaco Marine Services, Inc. shall recover from the Estate of Dau Van Tran et al.,

which shall pay, the costs in this Court and in the court of appeals.

A copy of this judgment and of the Court's opinion is certified to the court of appeals and to the District Court of Jefferson County, Texas, for observance.

(Opinion of the Court delivered by Justice Gammage)

April 24, 1991

* * *

APPENDIX B

THE SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

May 30, 1991

Mr. Michael C. Farrow
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Mr. John F. Waldo
Clann, Bell & Murphy
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801 Cherry Street
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Mr. Jon B. Burmeister
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285 Liberty, Suite #1900
Beaumont, TX 77701

Mr. George Sladczyk, Jr.
Moore, Landrey, Garth &
Jones
285 Liberty Street
Suite 1900
Beaumont, TX 77701

RE: Case No. D-0473

Style: TEXACO REFINING AND MARKETING, INC. AND TEXACO MARINE SERVICES, INC. v. ESTATE OF DAU VAN TRAN ET AL.

Dear Counsel:

Today, the Supreme Court of Texas overruled the motion for rehearing in the above referenced cause.

Sincerely,

JOHN T. ADAMS, Clerk

by Courtland Crocker
Courtland Crocker, Deputy

cc: Mr. Mitchell E. McKee

APPENDIX C

No. B-127,026

IN THE DISTRICT COURT OF JEFFERSON COUNTY, TEXAS 60TH JUDICIAL DISTRICT

ESTATE OF DAU VAN TRAN, ET AL.

vs.

TEXACO REFINING & MARKETING, INC., ET AL.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I.

Findings of Fact

1. That on September 16, 1985 (the "date in question"), Texaco Refining & Marketing, Inc. and Texaco Marine Services, Inc. (hereinafter referred to as the "Texaco Defendants") were the owner and/or operator of the vessel in question, the "Texaco California".

2. That Dau Van Tran ("Dau") was a 25-year old Vietnamese, who was the oldest child of Vi Thi Pham (hereinafter referred to as "Pham") and Do Van Tran (hereinafter referred to as "Tran"), his mother and father, respectively.

3. That on the date in question, Dau was not married and had no children.

4. That on the date in question, Farmer Boy's Catfish Kitchens International, Inc. was the owner and operator of Fisherman's Reef Dock in Sabine Pass, Jefferson County, Texas.

5. That on the date in question, Theresa Thi Nguyen and Anh Nguyen were the owners and/or operators of the fishing trawler "Miss Mary".

6. That on the date in question, Dau was not a crew member or employee of the "Miss Mary" and/or of Theresa Thi Nguyen and/or Anh Nguyen.

7. That on the date in question. Dau entered the water to remove a rope which had fouled the propeller of the "Miss Mary", while said vessel was moored at the Fisherman's Reef Dock in Sabine Pass, Texas.

8. That on the date in question, the Master of the "Texaco California" was Paul Kelley and the Sabine Pilot was Millard Scott.

9. That prior to the date in question, the Pilot, Millard Scott, had been involved in 3 previous accidents, hitting the Gulf Gate Bridge in 1987 and hitting 2 other vessels prior to that time, sinking at least 1 of said vessels.

10. That Plaintiffs' exhibits 6 through 13 were true and correct copies of various records pertaining to the "Texaco California" on the day in question, that were provided by the Texaco Defendants in response to discovery by Plaintiffs.

11. That Pilot Millard Scot went on board the "Texaco California" left the Texaco docks on or about 1304 hours on the day in question, and that there were no other large vessels in the channel during the applicable time periods on the day in question.

13. That as the "Texaco California" was going down the channel towards Sabine Pass, it increased its speed to full ahead at Beacon 40 at 1413 hours.

14. That as the "Texaco California" continued on down the channel, it went past Beacon 38 at 1421 hours, at which point the vessel reduced its speed from full ahead to half speed.

15. That the "Texaco California" averaged 8.8 knots from Beacons 47 to 40, that said vessel averaged 11.3 knots from Beacon 40 to Beacon 38, and that said vessel averaged 9.75 knots from Beacon 38 to Beacon 32.

16. That from Beacon 47 through Beacon 32 is a distance of 7.3 miles, and that said vessel averaged approximately 9½ knots during said distance.

17. That Fisherman's Reef is approximately 0.5 to 0.6 miles from the channel in which the "Texaco California" was traveling.

18. That Fisherman's Reef docks are near or at Beacon 38.

19. That at the time the "Texaco California" came closest to Fisherman's Reef, it was traveling at least 11.3 knots, and in reasonable probability was traveling in excess of said speed.

20. That William Cooner, the Manager of the Sabine Pass Port Authority, observed a very large surge and wake between 2:00 p.m. and 2:30 p.m. on September 16, 1985, that in his opinion was caused by a large ship.

21. That Mr. Cooner described the surge and wake as the largest he has seen during his time at the Sabine

Pass Port Authority, and that said wake came up on land 120 to 140 feet, causing 2 sandblasters who were working in the area to turn and flee from the wake.

22. That the "Texaco California" is approximately 715 feet long, 90 feet wide, and was drawing approximately 29 feet of water on the day in question.

23. That at 11.3 knots per hour, the "Texaco California" would displace approximately 1 million cubic feet of water per second.

24. That on the day in question, there was an approximate 15 knot per hour wind coming from the south, and a 2 foot high flood tide coming in.

25. That the "Texaco California" could have safely traveled half as fast as it actually did on the day in question, which would have eliminated the possibility of causing damage to divers and/or any other people who may have been in the water as the "Texaco California" passed.

26. That a ship such as the "Texaco California" is responsible for its wake and any damage caused thereby.

27. That the "Texaco California" was traveling at an excessive rate of speed on the day in question, causing an excessive surge of the "Miss Mary" at the Fisherman's wharf docks, which in turn caused the "Miss Mary" to crash against the dock in question, just as Dau was attempting to exit the water on the dock facilities, thereby crushing Dau between the "Miss Mary" and the dock.

28. That the "Texaco California" failed to keep a proper lookout on the day in question.

29. That the "Texaco California" failed to observe the rules of the road and the rules of good seamanship on the day in question.

30. That the Master of the "Texaco California" failed to control the speed of the Pilot on the day in question.

31. That the "Texaco California" failed to signal and/or to warn Dau that it was traveling at an excessive rate of speed on the day in question.

32. That each act described in Findings No. 27 through 31 constitute negligence.

33. That each act of negligence was a proximate cause of the death of Dau Van Tran.

34. That the conduct on the part of the "Texaco California" demonstrates an entire want of care, which raises the belief that the conduct complained of was the result of a conscious indifference to the rights of welfare of individuals such as Dau Van Tran.

35. That it was common knowledge up and down the Port Arthur Ship Channel that divers would from time to time be in the water working on vessels in various respects.

36. That because of said knowledge, it was essential that vessels such as the "Texaco California" travel at a slow rate of speed to avoid any possibility of injuring divers.

37. That the Master has the responsibility to control and direct the Pilot's conduct, including monitoring his speed, and reducing said speed if it is excessive, as it was in this situation.

38. That Farmer Boy's Catfish Kitchens International, Inc. did not commit any act of negligence.

39. That the decedent, Dau Van Tran, was negligent for attempting to get out of the water by climbing between the dock and shrimp boat.

40. That Dau, in the approximate 5 years prior to his death, contributed to his parents at the rate of approximately $1,000.00 a month.

41. That under Vietnamese custom, since Dau was the oldest son, he assumed leadership of the family unit, to include the mother, father and 9 siblings at the time in question.

42. That the decedent, Dau, would have continued to support his parents for the rest of their natural life expectancy, which in the case of the mother is 30.5 years and in the case of the father is 23.9 years.

43. That the parents shared a very close relationship with their son, Dau, and because of the negligence of the Texaco Defendants, said parents have been deprived of the companionship, affection and society of their son, Dau, both from the time of his death up through the time of trial, and for the rest of their natural lives.

44. That the parents have suffered severe mental anguish and sorrow as a result of the unfortunate and untimely death of their son, Dau, both from the time of the incident made the basis of the suit through the time of trial, and for the rest of the natural lives of the parents.

45. That the decedent, Dau, was conscious for at least 40 minutes after the incident in question occurred.

46. That the decedent, Dau, sustained excruciating pain and suffering and mental anguish during said 40 minute period.

47. That the decedent, Dau, incurred necessary medical expenses as a result of the negligence of the Texaco Defendants.

48. That the parents have incurred necessary and reasonable funeral and burial expenses as a result of the death of their son, Dau.

49. That the Texaco Defendants were not grossly negligent.

50. That to fairly compensate the Plaintiffs for the various elements of damages that they have suffered, the Court finds that the Plaintiff, Pham, should be awarded the sum of $250,000.00 for the mental anguish she has suffered from the time of the incident until the time of trial, $125,000.00 for the mental anguish that she will in reasonable probability suffer for the rest of her life because of the death of her son, Dau, $250,000.00 for the loss of companionship, affection and society for the time period from the date of the incident until the time of trial, and $125,000.00 for the loss of companionship, affection and society that she in reasonable probability will suffer for the rest of her natural life.

51. The Court finds that the father, Do Van Tran, should recover $125,000.00 for the mental anguish he has suffered from the time of the incident until the time of trial, $75,000.00 for the mental anguish that he in reasonable probability will suffer for the rest of his life because of the death of his son, Dau, $125,000.00 for the loss of

companionship, affection and society for the time period from the date of the incident until the time of trial, and $75,000.00 for the loss of companionship, affection and society that he in reasonable probability will suffer for the rest of his natural life.

52. That under the Survivorship Statute, the Court finds that the sum of $40,000.00 would be fair and reasonable to compensate the decedent for the conscious pain and suffering and mental anguish he endured during the 40 minute period he was conscious immediately after the crushing injury he received on the day in question.

53. That under the Survivorship Statute, the sum of $1,849.55 should be recovered for the reasonable and necessary medical expenses incurred on behalf of Dau, and the sum of $3,000.00 should be recovered which represents the reasonable and necessary funeral and burial expenses incurred.

54. That the parents have sustained damages in the sum of $30,000.00 for the pecuniary loss they have suffered from the time of the incident through the date of trial because of the death of their son.

55. That the sum of $100,000.00 would fairly and reasonably compensate the parents for the pecuniary loss that they in reasonable probability will suffer in the future for the wrongful death of their son, Dau.

56. That the decedent was 15% at fault and the Texaco defendants were 85% at fault.

57. That the Texaco defendants are entitled to a credit of $22,500.00 for the amount paid in settlement by Anh Nguyen and Theresa Nguyen.

II.

Conclusions of Law

1. That because of the negligence of the Texaco Defendants in various respects, each of which was a proximate cause of the Plaintiffs' damages, the Plaintiffs should recover from Texaco Refining & Marketing, Inc. and Texaco Marine Services, Inc., jointly and severally, the sum of $1,324,849.55 as actual damages, less $198,727.43, (which is the amount to be deducted for the 15% contributory negligence of the decedent) and also less $22,500.00 (the amount of settlement funds paid by AHN NGUYEN and THERESA NGUYEN to the Plaintiffs), which leaves a net recovery of $1,103,622.12.

2. That the Plaintiffs should take nothing of and from the Defendant, Farmer Boy's Catfish Kitchens International. Inc.

3. That the Texaco Defendants, Texaco Refining & Marketing, Inc. and Texaco Marine Services, Inc., should have and recover of and from Farmer Boy's Catfish Kitchens International, Inc., nothing.

4. That the Third-Party Plaintiffs, Texaco Refining & Marketing, Inc. and Texaco Marine Services, Inc., should have and recover of and from the Third-Party Defendants, Theresa Nguyen and Anh Nguyen, nothing.

5. That the Plaintiffs should be entitled to recover pre-Judgment interest on all elements of damages that have accrued from a time period 6 months after the incident in question up through the date Judgment is entered, which is the sum of $209,489.18.

6. That the Plaintiffs are entitled to recover post-Judgment interest at the rate allowed by law.

SIGNED this the 28th day of September, 1988.

/s/ Gary Sanderson
Judge Presiding

APPENDIX D

NO. B-127,026

IN THE DISTRICT COURT OF JEFFERSON COUNTY, TEXAS 60TH JUDICIAL DISTRICT

ESTATE OF DAU VAN TRAN, ET AL.

vs.

TEXACO REFINING & MARKETING, INC., ET AL.

FINAL JUDGMENT

BE IT REMEMBERED that on the 19th day of September, 1988, came on to be heard the above styled and numbered cause, and the Plaintiffs appeared in person and by and through their attorneys of record, and the Defendants appeared by and through their attorneys of record, and all parties announced to the Court that they agreed to try the case non-jury, and the Court proceeded to hear the evidence and argument of counsel, is of the opinion that the Plaintiffs should have and recover of and from TEXACO REFINING & MARKETING, INC. and TEXACO MARINE SERVICES, INC., jointly and severally, the sum of ONE MILLION ONE HUNDRED THREE THOUSAND SIX HUNDRED TWENTY TWO AND $^{12}/_{100}$ DOLLARS ($1,103,622.12), that Plaintiffs should take nothing of and from the Defendant, FARMER BOY'S CATFISH KITCHENS INTERNATIONAL, INC., that TEXACO REFINING & MARKETING, INC. and TEXACO MARINE SERVICES, INC., should have and recover of and from FARMER BOY'S CATFISH KITCHENS INTERNATIONAL, INC., nothing, that the Third-Party Plaintiffs, TEXACO REFINING & MARKETING, INC. and TEXACO MARINE SERVICES, INC., should have and recover of and from the Third-Party Defendants,

THERESA NGUYEN and ANH NGUYEN, nothing, that the Plaintiffs should be entitled to recover pre-Judgment interest on all elements of damages that have accrued from a time period six (6) months after the incident in question up through the date Judgment is entered, which is the sum of TWO HUNDRED NINE THOUSAND FOUR HUNDRED EIGHTY NINE AND 18/100 DOLLARS ($209,489.18), and that the Plaintiffs are entitled to recover post-Judgment interest at the rate allowed by law. It is, therefore,

ORDERED, ADJUDGED and DECREED that Plaintiffs DO VAN TRAN and VI THI PHAM recover of and from the Defendants, TEXACO REFINING & MARKETING, INC. and TEXACO MARINE SERVICES, INC., jointly and severally, the sum of ONE MILLION THREE HUNDRED THIRTEEN THOUSAND ONE HUNDRED ELEVEN AND 30/100 DOLLARS ($1,313,111.30).

It is further ORDERED, ADJUDGED and DECREED that Plaintiffs take nothing of and from the Defendant, FARMER BOY'S CATFISH KITCHENS INTERNATIONAL, INC.

It is further ORDERED, ADJUDGED and DECRRED [sic] that Defendants TEXACO REFINING & MARKETING, INC. and TEXACO MARINE SERVICES, INC., should have and recover of and from FARMER BOY'S CATFISH KITCHENS INTERNATIONAL, INC., nothing.

It is further ORDERED, ADJUDGED and DECREED that Third-Party Plaintiffs, TEXACO REFINING & MARKETING, INC. and TEXACO MARINE SERVICES, INC., should have and recover of and from the Third-Party Defendants, THERESA NGUYEN and ANH NGUYEN,

nothing. The above sum shall draw interest at the legal rate from date of Judgment until paid. All other relief not expressly granted herein is denied.

SIGNED this the 28th day of September, 1988.

/s/ GARY SANDERSON
Judge Presiding

APPENDIX E

COURT OF APPEALS
NINTH DISTRICT OF THE STATE OF TEXAS
1001 Pearl, Suite 330
Beaumont, Texas 77701

Shirley Forrest,
Clerk

Judgment entered August 31, 1989

No. 09-89-009 CV

Texaco Refining & Marketing, Inc., et al

vs.

Estate of Dau Van Tran, et al

Appealed from the 60th District Court of
Jefferson County, Texas

Opinion by Justice Jack Brookshire

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this Court that there was no error in the judgment; it is therefore considered, adjudged and ordered that the judgment of the Court below be in all things affirmed and that all costs of the appeal be assessed against the appellants, Texaco Refining & Marketing, Inc. and Texaco Marine Services, Inc. A copy of this judgment shall be certified below for observance.

A true copy of the judgment, to be entered, I hereby certify.

/s/ SHIRLEY FORREST
Shirley Forrest,
Clerk

TEXACO REFINING & MARKETING, INC.,
and Texaco Marine Services, Inc.,
Appellants,

v.

ESTATE OF Dau Van TRAN, Vi Thi Pham, Do Van Tran, Farmer Boy's Catfish Kitchens International, Inc.,
Theresa Nguyen and Anh Nguyen,
Appellees.

No. 09-89-009-CV.

Court of Appeals of Texas,
Beaumont.

Aug. 31, 1989.

OPINION

BROOKSHIRE, Justice.

Originally, the Appellees, Vi Thi Pham and Do Van Tran, brought this cause of action based, primarily, on negligence and gross neglect, to recover their damages and injuries arising out of the death of Dau Van Tran. Dau was their son. He died on September 16, 1985. The pleadings alleged that Dau was crushed to his death between a shrimp boat and a dock or dock barge.

The litigation was initiated against the Texaco Refining & Marketing, Inc. (TRMI) and Texaco Marine Services, Inc. (TMSI). TRMI and TMSI were said to be the owners and operators of a certain seagoing vessel named TEXACO CALIFORNIA. Farmer Boy's Catfish Kitchens International, Inc. (Farmer Boy's) was a party-defendant, being the alleged owner of the dock at which the fishing trawler was tied up.

TRMI and TMSI filed a third-party action against Theresa Thi Nguyen and Anh Nguyen, the owners of the trawler, MISS MARY, on the theories of contribution and indemnity and maintaining that the Nguyens were directly responsible to Pham and Tran. A trial followed without the intervention of a jury. There were numerous Findings of Fact and separate Conclusions of Law. Judgment was cast against TRMI and TMSI, including some limited, prejudgment interest and post-judgment interest. No punitive damages were awarded. TRMI and TMSI failed in their action over and against Farmer Boy's. Several post-judgment motions were filed. TRMI and TMSI did not prevail in any of these motions. This appeal timely followed.

In a well-briefed and scholarly-presented point of error, the Appellants charge that there is no evidence to support the finding of the Bench and the judgment thereon relative to the Appellants' negligence and its proximate causation of any damages. Their argument is that any conceivable liability (either negligence or proximate causation) is based solely on the opinion testimony of experts proffered by the plaintiffs below (Pham and Tran). The Appellants state that the testimony of these experts relies upon hearsay with absolutely no independent evidence of numerous, vital facts. Texas Rules of Civil Evidence, it was acknowledged, had become fully effective on September 1, 1983. *TEX. R. CIV. EVID. 701*, to and including *705*, delineated a significant departure from the previous rules of the admissibility of evidence and of the opinion testimony of experts.

TEX. R. CIV. EVID. 702 permits scientific, technical or other specialized knowledge which will assist the trier of

fact to understand the evidence or to resolve a fact that is in issue. Then, a witness, who is qualified as an expert by either knowledge, skill or experience, may testify thereto "in the form of an opinion or otherwise". Independent of *Rule 702* is *Rule 703*, authorizing an expert to base his opinion on facts or data made known to that expert at the trial or before the trial. The expert may base an opinion, or an inference, on facts or data perceived by the expert or made known to him. Significantly, if the facts or data are of a type that are reasonably relied upon by the experts in the particular field involved in forming their expert opinions or inferences upon the particular subject matters; then the facts or data, themselves, need not be admissible.

TEX. R. CIV. EVID. 704 was certainly a significant, if not a revolutionary, change. *Rule 704* dramatically stated:

> "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

And, of course, *TEX. R. CIV. EVID. 705* has importance here in that it permits an expert to testify as to his opinions, as to his inferences, and give his reasons therefor without a prior disclosure of the underlying facts or data, subject to the trial bench's discretionary rulings.

The father and mother of Dau Van Tran maintain that a large wave, of considerable force and height, was caused by the passage of the tanker, TEXACO CALIFORNIA. They pleaded that the speed of the TEXACO CALIFORNIA was excessive and the excessive speed caused the wave and proximately caused the death of Dau Van Tran, their oldest son.

There was a witness fairly near the scene of the tragedy at the time, one William Cooner. Cooner testified that he saw a large wave come up on the shore. The wave washed 120 to 130 feet inland. He further stated that he did not see any vessel, however, which might have caused that wave. Mr. Cooner stated that the wave he testified about was the largest surge, or largest wave, he had ever witnessed. He further swore that not seeing a vessel was not unusual because, by the time the wave, wake or surge gets to the dock or the shore, the distance traveled by the large wave is so great that the vessel causing the same would be down past a certain public park and could not be seen that far off.

Extensive pretrial discovery was developed. Each side, in the discovery process, exhibited thoroughness, diligence and detailed attention to the fact issues to be tried. To one set of interrogatories, the Appellants answered that, on or about September 16, 1985, the vessel, TEXACO CALIFORNIA, did pass the fisherman's Reef barge dock, located in Sabine Pass, in Jefferson County. This dock was owned or leased by Farmer Boy's. This was an answer made by Texaco Refining and Marketing, Inc., the owner at the time in question of the seagoing tanker. These answers were sworn to by the affiant who made oath that he had personal knowledge of these facts. His sworn affidavit was dated October 27th,1987. Is [sic] is correct that, later, this answer was changed. It is interesting to note that the very question was asked in previous federal court interrogatories. It was previously answered "Yes". The litigation had been

originally filed in the United States District Court. Apparently, the Defendants/Appellees impleaded a third-party defendant, which was a Texas corporation.

The decedent's probate estate was open and pending in the Jefferson County Probate Court and, in view of the nature of the parties' citizenships, the federal court case was non-suited and the case refiled in the state court.

Certain responses made to the interrogatories stated that TRMI admitted that the TEXACO CALIFORNIA made speed of about 8.8 knots from buoy 47 to buoy 40, then approximately 11.3 knots from buoy 40 to buoy 38 and, later, 9.7 knots from buoy 38 to buoy 32. Mr. Owens, a maritime expert, testified that he confirmed these various speeds by checking the distances and the times involved. Owens stated the speeds were also documented in the Deck Log and Bell Sheets of the vessel. Owens also further swore that the average transit speed of the tanker was 9½ knots. It is sufficient to state that the experts put on the stand by the Plaintiffs/Appellees swore that the seagoing tanker was not practicing good seamanship. One expert characterized these speeds as "barreling down". The expert further testified that the TEXACO CALIFORNIA was negligent in its speed and its seamanship; that is, the good seamanship that she, the vessel, failed to employ. We find, in the record:

> "Q In other words, it was negligent in several different areas?
>
> "A Yes, I do. Certainly Scott and the Skipper should have been able to appraise this area. They have been through there enough. That's a total disregard for the rights of others moored along in there.

"Q As a matter of fact, I was going to ask you if you had an opinion as to whether or not their conduct on this particular occasion constituted gross negligence if we assume that gross negligence is the entire want of care which would raise the belief that the acts or omissions complained of was the result of a conscience indifference to the rights or welfare of the person or persons to be affected by it?

"A Yeah. I figure that's gross negligent [sic] on their part, yes, I do.

Mr. Cooner was looking in the correct direction when he saw a large wave come upon the beach and roll back upon and beyond the shoreline to a depth of about 120 feet to 140 feet. This large wave, or surge, occurred sometime around 2:00 or 2:30 P.M. On September 16, 1985, the TEXACO CALIFORNIA took her pilot aboard at 1304. Her last line was off at 1326.

The record reflects that the TEXACO CALIFORNIA passed buoy 47 at 1353 hours on September 16, 1985. At buoy 47, the record reflects that the vessel was traveling 8.8 knots but that its minimum steerageway speed was estimated at 2½ to 3 knots. The time of the large wave, or surge, is compatible with the time of the death of Dau Van Tran.

A second expert, placed on the stand by Tran and Pham, a Mr. Roger L. Owens, expressed an opinion based on information he had, plus his research, calculations and on-site inspections. He said the cause of the accident made the basis of this suit was:

"A . . . [J]ust excessive speed of a very large loaded vessel transiting the Canal."

Further, Mr. Owens used a definition of gross negligence as being "that entire want of care which would raise the belief that the act or omission complained of was a result of a conscious indifference to the right or welfare of a person or persons to be affected by it", and Owens, reaffirming that he understood the definition, was asked if he had an opinion as to whether or not the TEXACO CALIFORNIA was grossly negligent. His answer was:

> "A Yes, because the Master was grossly negligent."

Other evidence of probative force exists in the record, which was admissible as opinions and inferences of the experts under *TEX. R. CIV. EVID. 702, 703, 704* and *705*. This was a bench trial where an experienced district judge could properly weigh the testimony of the witnesses and assess the credibility that the testimony merited. A presumption exists that the judge considered only proper evidence.

Upon analysis, and upon applying the accepted standards for appellate review, we overrule the Appellants' first point of error. *Garza v. Alviar,* 395 S.W.2d 821 (Tex. 1965); *In re King's Estate,* 150 Tex. 662, 244 S.W.2d 660 (1951); R. Calvert, *" 'No Evidence' and 'Insufficient Evidence' Points of Error"*, 38 TEXAS L. REV. 361 (1960). Compellingly similar standards govern bench trials.

Appellants' Point of Error II is:

> "There is no evidence of record to support the award of survival damages."

An ambulance service received an emergency call at about 1425 hours on September 16, 1985. The ambulance

arrived in Sabine Pass at 1447 hours, picked up Dau Van Tran, and left Sabine Pass at 1502 hours and arrived at the hospital in Port Arthur at 1523 hours. There exists a narrative account of the medical assistance that was afforded to Dau Van Tran by the Diamond Emergency Medical Services.

In addition, a witness, who qualified as an expert, named Captain Robert J. Underhill, testified that the MISS MARY was pulled out, fetched back on her lines and then came slamming back in because of the large wave. When the MISS MARY came slamming back in, according to the expert, it slammed Dau Van Tran between its side and the dock barge. This was described as a pretty violent blow to the body of Dau, the violent blow resulting from the excessive speed of the TEXACO CALIFORNIA, and from nothing else, according to Captain Underwood. His testimony was that the young man was still conscious after the incident took place and that Dau had been moaning and uttering groans. Dau was alive when he left the scene of the occurrence and the record reflects that Dau survived for at least 35 to 40 minutes. We conclude that there was sufficient evidence to support the Bench's finding that Dau suffered conscious pain and conscious suffering for about 35 to 40 minutes. The award for this element of damages was not excessive. For example, in *Gulf States Utilities Co. v. Reed*, 659 S.W.2d 849 (Tex. App. – Houston [14th Dist.] 1983, writ ref'd n.r.e.), an award was made in the amount of $10,000. to a mother for the pain and suffering of her son. The pain and suffering had a duration of approximately 5 seconds.

In another, somewhat parallel and persuasive, case, a citizen of the United States of Mexico recovered $175,000. for conscious pain and suffering during an undetermined amount of time. That case is *Levinge Corp. v. Ledezma*, 752 S.W.2d 641 (Tex. App. – Houston [1st Dist.] 1988, no writ). In that situation, the employer's accident report revealed that the time of injury was about 3:05 p.m. The arrival of the injured person at the emergency room occurred about 3:30 p.m., the death occurring at 3:43 p.m. A fellow worker saw the deceased fall from a pickup truck, hit the ground and bounce and jerk. The witness testified that the man's eyes were open and he was coughing and gasping for air and that blood was spurting forth from his mouth in a steady emission. The deceased was trying to expectorate it. The Houston Court of Appeals declined to substitute its own judgment for that of the trier of the facts, stating that it could only do so if the record clearly indicated that the award was based upon passion, prejudice, improper motive or was so excessive as to actually shock the conscience of the jurists. We do not find these passions and improper motives here. *See and compare K-Mart Apparel Fashions Corp. v. Ramsey*, 695 S.W.2d 243 (Tex. App. – Houston [1st Dist.] 1985, writ ref'd n.r.e.).

Nextly, the Appellants advance that prejudicial error was committed when the trial court sustained the objections of the Appellees to the testimony of the Appellants' designated expert witnesses. The designation by the Appellants of their expert witnesses was made somewhat less than 30 days prior to the start of the trial on the merits.

The significant facts are that, on two occasions prior to the late letter adding the Appellants' two experts,

Gilbert and Horne, the Appellants had answered "unknown at present" when the Plaintiffs/Appellees attempted to ascertain the identity of all the expert witnesses to be proffered by the Appellants. The Appellants have simply failed to meet their burden of good cause in the sense that they have failed to convince the trial bench that their late designation of the two experts was reasonable. The recent trend of the decisions on the discovery rules is that the imposition of either penalties or sanctions for the failure, delay or refusal of a party to comply with discovery rules rests within the sound discretion of the trial court. The trial court has the burden of seeing to it that the discovery rules are followed after having been clearly mandated by our Supreme Court. The trial court also has the burden, to a great extent, to see that the case is properly prepared for an adequate and truth-seeking trial on the merits. The decisions reached by the district bench, in an attempt to obtain compliance with the discovery rules, cannot be reversed unless the appellate court determines that the trial bench abused its discretion as a matter of law. We simply cannot make such a finding under this record. *Alexander v. Barlow*, 671 S.W.2d 531 (Tex. App. – Houston [1st Dist.] 1983, writ ref'd n.r.e.); *Jarrett v. Warhola*, 695 S.W.2d 8 (Tex. App. – Houston [14th Dist.] 1985, writ ref'd).

The Appellants' brief next advances that it was error to award damages for past and future mental anguish; and that it was clearly error for the trial court to award prejudgment interest thereon. *See and compare Moore v. Lillebo*, 722 S.W.2d 683 (Tex. 1986); *Clifton v. Southern Pacific Transp. Co.*, 709 S.W.2d 636 (Tex. 1986).

The basic position taken by the Appellants is that the deceased, Dau Van Tran, was a seaman and Dau was injured and met his death on navigable waters and, therefore, the general maritime law should not only control but be the exclusive law applicable. Under the general maritime law, the Appellants argue that any damages for mental pain or mental anguish, or any interest, should be entirely disallowed. However, as a defensive matter, it was never pleaded that Dau was a seaman. The court did not find that Dau was a seaman.

The Appellants' live pleadings was their Original Answer which set up, generally, the defenses of contributory negligence, negligence of third party, assumption of risk and unavoidable accident. It is not shown in the record that Dau was a seaman. The record reflects that he worked for himself and that he was in the nature of a volunteer when attempting to help out an older man who was the Captain of the MISS MARY by retrieving or relieving some sort of an object from around or near the propeller. The record shows that he was not being paid by anyone and that he volunteered to help a much older man, a Mr. Yen Nguyen. There is ample evidence of probative force that, as a result of the large wave and surge, that protruded upon the land 120 feet to 130 feet, or more, the MISS MARY was pulled out, fetched up on her lines and then slammed back in against the dock barge. There is evidence that Dau was against the dock barge between two tires and the slamming back in of MISS MARY was strong enough to squash the two tires and Dau Van Tran as well. Therefore, the actual death-producing trauma or injury was experienced on or at the dock. Such a dock, or dock barge, has been recognized as

an extension of the land. From the record, it was shown that death occurred within the State territorial waters.

It is clear, in the present case, that the Appellees sought to obtain a judgment against the Appellants based on the theory of negligence under the Texas Wrongful Death Statute. *TEX. CIV. PRAC. & REM. CODE ANN. Secs. 71.001-71.002* (Vernon 1986), and the Texas Survival Statute *TEX. CIV. PRAC. & REM. CODE ANN. Sec. 71.021* (Vernon 1986). The Appellees did not plead for relief under the doctrine of unseaworthiness. They did not invoke the maritime law.

As the points were presented and argued on appeal, we conclude that the Appellants should have pleaded that Dau Van Tran was a seaman. They should have pleaded facts invoking the general maritime law, or general admiralty law. Appellants' pleadings do not exclude the Texas Wrongful Death Statute nor the Survival Statute. Vis-a-vis the Plaintiffs'/Appellees' live pleadings at the trial bench, TMSI's and TRMI's contentions as to the status of Dau Van Tran was in the nature of an affirmative defense. *TEX. R. CIV. P. 94* required such an affirmative pleading to give fair and reasonable notice to the plaintiffs below. This, the Appellants failed to do. Indeed, there is documentary evidence in the case that Dau Van Tran was self-employed and simply had no employment relationship to the MISS MARY or the captain thereof. There is really no contention and there is no question but that Dau Van Tran was not a longshoreman. He simply did not fit under the definition of a longshoreman, under the Longshore and Harbor Workers' Compensation Act, *33 U.S.C.A. Sec. 901* et seq. (1986). The tragic death occurred within the city limits of Port Arthur, Jefferson

County. There is no application, here, of death on the high seas act, popularly known as "DOHSA", *46 U.S.C. Sec. 761* et seq. The high seas have been authoritatively limited as being more than one league, or about 3 miles, off the shoreline.

As early as 1928, the Supreme Court of the United States has held that a stage and a wharf are generally deemed to be an extension of the land. *T. Smith & Son, Inc. v. Taylor,* 276 U.S. 179, 48 S.Ct. 228, 72 L.Ed. 520 (1928). Importantly, *Executive Jet Aviation, Inc. v. Cleveland,* 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972), pointed out that a maritime locality, alone, was not sufficient to invoke the exclusive admiralty jurisdiction. Justice Stewart stressed that the main business of the admiralty court involves claims for cargo damage, collisions of vessels, injuries to seamen and the like. The Supreme Court of the United States found serious difficulties with using the locality test only, further pointing out that, for the federal admiralty jurisdiction to come into play, there must be a maritime nexus or connection; that is, some substantial relationship between the tort and traditional maritime activities, such as navigation or commerce on navigable waters. When such a relationship or nexus is absent, the fact that a tort may have occurred upon navigable waters is immaterial to any meaningful and determinative invocation of the jurisdiction of the admiralty courts.

The Fifth Circuit Court of Appeals for the United States, in 1981, decided *Karpovs v. State of Mississippi,* 663 F.2d 640 (5th Cir. 1981). Circuit Judge Politz, writing without a dissent, held, at page 648:

> " . . . Maritime jurisdiction does not extend to torts occurring on piers, bridges, jetties, or

> even ramps or railways running into the sea. *Rodrique v. Aetna Casualty Co.*, 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969). Any suggested inroads on this long-standing rule ended in 1972, when the Supreme Court held that in addition to a maritime locality, admiralty jurisdiction will not lie unless there is a significant relationship between the tort claim and traditional maritime activity. *Executive Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972); *Richardson v. Foremost Insurance Co.*, 641 F.2d 314 (5th Cir. 1981).

We simply find no significant relationship between the negligence claim herein and traditional maritime activity.

From the standpoint of parallel reasoning and analagous rationale and an analysis of the clear, congressional purpose, the compelling case is *The Tungus v. Skovgaard*, 358 U.S. 588, 79 S.Ct. 503, 3 L.Ed.2d 524 (1959). In *The Tungus, supra*, the Supreme Court reasoned and held that a policy expressed and enacted by the legislature of a sovereign state in passing a wrongful death statute is not merely that the death shall give rise to the right of recovery, nor that the tortious or negligent conduct resulting in the death shall be actionable; but, just as importantly, the damages provided by the wrongful death statute shall be recoverable when actions or omissions of a particular kind result in a death. Thus, it becomes incumbent upon a court enforcing that legislative policy to enforce it all. The enforcing court may not pick or choose.

The Supreme Court reasoned that congressional enactments, such as the Death on the High Seas Act, clearly manifest that the rights, remedies and damages under the state death statutes (when deaths occur on

state territorial waters), were all to be left unimpaired and that the overall intent of the Congress was to preserve; indeed, to insure the state's sovereignty over death actions even though caused by maritime torts occurring with the state's territorial waters. *See Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978). In 436 U.S., at page 620, Footnote 9, 98 S.Ct., at page 2012, Footnote 9, 56 L.Ed.2d, at page 584, Footnote 9, it reads:

> "9. sec. 766. In addition, the statute preserved the applicability of local law on the Great Lakes, in the Panama Canal Zone, and with the States' territorial waters. Sec. 767. Rights under foreign wrongful-death laws were also preserved. Sec. 764."

Justice Oliver W. Holmes, a giant of a jurist, reasoned, in *Old Dominion Steamship Co. v. Gilmore*, 207 U.S. 398, 28 S.Ct. 133, 52 L.Ed.264 (1907), that Congress had the power to regulate commerce and to legislate upon admiralty and maritime jurisdiction; further, the Congress could extend the judicial power to cases of admiralty and maritime jurisdiction. The Congress had been silent up to a point. Justice Holmes held that the savings to the suitors clause leaves open and in full force the commonlaw jurisdiction of the States' courts, even over torts committed at sea, and the State courts, in their decisions, could and would follow their own notions about this field of law.

The reasoning and the holdings of *The Tungus, supra*, authorizes and, indeed, requires us to overrule the Appellants' points of error attacking the allowance of damages for mental anguish and damages by way of prejudgment interest, except as to future mental anguish.

We conclude no prejudgment interest was awarded on future damages in the judgment. The judgment exceeds one million dollars.

We hold that the 60th Judicial District Court of Texas had jurisdiction and full authority to try the case, having jurisdiction and venue of the parties and the subject matter. Because of the locale of the injury and because of the lack of impact on general maritime commerce and navigation, inter alia; we decide that the governing, ultimate facts, as found by the trial bench, do not constitute a maritime tort. But, even if the facts, as found below, constituted a maritime tort, which we deny; nevertheless, the Texas District Court had full jurisdiction pursuant to Texas Wrongful Death Statute and the Texas Survival Statute. *Mobil Oil Corp. v. Higginbotham, supra,* and *Old Dominion Steamship Co. v. Gilmore, supra.*

28 U.S.C.A. Sec. 1333 (1966) specifically saves to the suitors in all cases all other remedies to which they are otherwise entitled. This saving to the suitors provision applies to any civil case that might otherwise be considered within the admiralty or maritime jurisdiction. Texas has provided other remedies under *TEX. CIV. PRAC. & REM. CODE ANN. Secs. 71.001 and 71.021* (Vernon 1986).

The Appellants' last point of error, VII, avers that the evidence is insufficient to support the findings of negligence and causation and the court's judgment based thereon and, as a subpoint, that the findings and judgment are so against the overwhelming weight and preponderance of the evidence as to be clearly wrong and unjust. We disagree. The above discussion overrules this point.

Appellants attack the trial bench's monetary award for loss of society, companionship and affection. They simply advance the contention that the amount of damages for this loss is excessive and against the great weight and preponderance of the evidence. They cite *Pope v. Moore*, 711 S.W.2d 622 (Tex. 1986), placing major reliance on *Pope v. Moore, supra.*

In *Pope, supra,* in a per curiam opinion by the Supreme Court, the court held that factual sufficiency is the sole remittitur standard for actual damages and in deciding whether the damages are excessive. Courts of appeal should employ the same test as for any other factually insufficient question. Courts of appeal must detail the relevant evidence, if any, requiring remittitur and when ordering a remittitur the appeals court shall clearly state why the fact finder's award is so factually insufficient or, on the other hand, so against the great weight and preponderance of the evidence as to be manifestly unjust.

Our court should be aware of the preachments in *Pool v. Ford Motor Co.*, 715 S.W.2d 629 (Tex. 1986), even in this bench-tried case. Pursuant to *Pope, supra,* and *Pool, supra,* upon an analysis of the evidence on this point, we cannot order a remittitur. The judgment below is affirmed.

AFFIRMED.

APPENDIX F

NO. 09-89-009 CV

TEXACO REFINING & MARKETING, INC., TEXACO MARINE SERVICES, INC., APPELLANTS	*	APPEAL FROM THE 60TH
VS.	*	JUDICIAL
ESTATE OF DAU VAN TRAN, VI THI PHAM, DO VAN TRAN, FARMER BOY'S CATFISH KITCHENS INTERNATIONAL, INC., THERESA NGUYEN AND ANH NGUYEN APPELLEES	*	DISTRICT COURT OF JEFFERSON COUNTY, TEXAS

FILED

AUG 30 1990

OPINION ON MOTION ON REMAND FROM THE UNITED STATES SUPREME COURT

The Maritime Law Association of the United States filed a brief as amicus curiae. The petition for writ of certiorari was granted. Of course, Maritime Law Association of the United States was not before us. Thereafter, a writ of certiorari was granted by the Supreme Court of the United States and the judgment in the case was vacated by the Supreme Court and the case remanded to our Court of Appeals for further consideration in light of *Sisson v. Ruby*, 58 USLW 4941 (U.S. June 26, 1990) rev'd 867 F2d 341 (7th Cir. 1989). *Sisson, supra,* was decided June 25, 1990, after the date of our opinion.

We have assiduously reconsidered our opinion in light of *Sisson v. Ruby, supra.* In an outstanding opinion, Mr. Justice Marshall wrote, as his opening sentence:

> "We must decide whether *28 U.S.C. s 1333 (1),* which grants federal district courts jurisdiction over '[a]ny civil case of admiralty or maritime jurisdiction,' confers federal jurisdiction over petitioner's limitation of liability suit brought in connection with a fire on his vessel. We hold that it does."

No limitation of liability issue is before us in *Texaco Refining & Marketing, Inc., et al v. Estate of Dau Van Tran, et al.*

Sisson was the owner of a 56-foot pleasure yacht. While the yacht was docked at a marina on Lake Michigan, a fire erupted in the area of the washer/dryer unit. The fire destroyed the pleasure yacht and damaged several nearby vessels and the marina. Subsequent to the fire, the respondents filed claims against Sisson for over $275,000.00 for damages to the marina and the other vessels. Then, Sisson invoked the provisions of the Limited Liability Act which limits the liability of an owner of a vessel for damage done "without privity or knowledge of such owner" to the value of the vessel and its freight. 46 U.S.C.A. s 183 (a) (1982). Sisson petitioned the Federal District Court to limit his liability to $800.00 being the salvage value of his yacht after the fire. We must stress and respectfully point out that the sole issue was damage to property in *Sisson, supra.* We deal, here, with a personal injury and death action. Also, this appealed case was originally brought in the State District Court of Texas and not in a United States District Court.

By the pleadings of Texaco Refining and Marketing, Inc., et al, the original defendants invoked the Texas Rules of Civil Procedure, especially TEX. R. CIV. P. 92 thereof. The pleadings were further to the effect that Texaco Refining & Marketing, Inc. (TRMI) and Texaco Marine Services, Inc. (TMSI) were not responsible for any breach of any duty but that the sole fault and negligence were due to third parties. As an affirmative defense, the defendants below pleaded the doctrine of volenti non fit injuria or the assumption of risk.

Texaco Refining & Marketing, Inc., below and Texaco Marine Services, Inc. – neither one – pleaded that the cause of action was within the maritime or admiralty cognizance or jurisdiction. Hence, they waived the same. TEX. R. CIV. P. 94. Nor did the defendants below plead or prove that the deceased was a seaman; nor did they plead or prove that the remedies under the Texas Wrongful Death Statute, TEX. CIV. PRAC. & REM. CODE ANN. sec. 71.001-71.002 (Vernon 1986) and the Texas Survival Statute, TEX. CIV. PRAC. & REM. CODE ANN. sec. 71.021 (Vernon 1986), were not applicable.

At the trial court level, the defendants simply failed to plead the constitutional and/or statutory contentions that they are now claiming. No special exceptions were leveled against the plaintiffs' pleadings seeking recovery for mental anguish. Since no special exceptions were leveled and no affirmative pleadings were advanced, the defendants below effected a waiver. TEX. R. CIV. P. 94. *Highway Contractors, Inc. v. West Tex. Equipment,* 617 S.W.2d 791 (Tex. Civ. App. – Amarillo 1981, no writ). See also *Borders v. KRLB, INC.,* 727 S.W.2d 357 (Tex. App. – Amarillo 1987, writ ref'd n.r.e.). An affirmative pleading

is required to support or sustain some independent grounds of evidence or defense stating why the plaintiffs are barred from recovering under their live pleadings and this affirmative, defensive pleading must be timely urged to the trial court.

It was only after the case was tried and decided, that the defendants, for the first time, contended that the Texas Wrongful Death Statute and the Texas Survival Statute, cited above, were not the proper statutes of recovery for the plaintiffs. Clearly, then, the Appellants in our Court of Appeals, are necessarily taking the position that, even if the plaintiffs' claims were true, the said death statute and the survival statute, as pleaded by the plaintiffs in support of their claims for damages, simply did not permit plaintiffs to recover under the facts and evidence of the cause of action. This late position, then, is a matter constituting an avoidance and is certainly an affirmative defense. Hence, it had to be affirmatively pleaded, set forth and urged, under TEX. R. CIV. P. 94.

This is patently clear because the defendants below, appellants here, now take the position that the plaintiffs simply could not recover any damages whatsoever for mental anguish. Indeed, affirmative defenses, as distinguished from a defendant's denials, are those propositions and contentions which a defendant, or defendants, may assert and interpose to defeat a pleaded cause of action brought by a plaintiff. These affirmative, pleaded defenses allow a defendant to introduce evidence which does not tend to rebut the factual propositions asserted and pleaded by the plaintiff; but, rather, set forth and establish an independent reason why the plaintiff simply should not recover an element of of [sic] damage sought

by the plaintiff. See *Hays Cons. Ind. Sch. D. v. Valero Trans. Co.*, 645 S.W.2d 542 (Tex. App. – Austin 1982, writ ref'd n.r.e.).

Hence, if a party, either plaintiff or defendant, fails to plead an affirmative defense, then the district court cannot enter a judgment based on that affirmative defense. This is true because a trial court's judgment must conform to the pleadings. This is a stringent rule and evidence will not cure the failure of a judgment to comport with the pleadings. See *Hays Cons. Ind. Sch. D., supra.* Since the now contended-for affirmative defense was neither pleaded nor proved, it was and is certainly waived. Clearly, then, since the appellants here neither pleaded nor proved the inapplicability of the Texas Wrongful Death Statute and the Texas Survival Statute, they waived the defense and they simply cannot advance it with success at the appellate level.

Penalty or Result of Waiver

Well-established precedents exist that affirmative defenses must be pleaded and proved. Otherwise, they are waived. *Christian v. First Nat. Bank of Weatherford*, 531 S.W.2d 832 (Tex. Civ. App. – Fort Worth 1975, writ ref'd n.r.e.). The trial pleadings of the defendants below glaringly reveal that the defendants did not plead and did not prove the inapplicability of the Texas Wrongful Death Statute and the Texas Survival Statute.

The general rule is established that a federal appellate court declines to consider an issue or defense that was not raised below. *See Hormel v. Helvering*, 312 U.S. 552, 61 S.Ct. 719, 85 L.Ed. 1037 (1941). The Supreme Court

of the United States has carefully explained that it is essential that the issues be presented below timely in order that the parties may have the full opportunity to proffer all the relevant evidence on the issues. Also, importantly, the parties should have the opportunity to present, fully and intelligently, whatever legal arguments the parties have in favor of a statute. *Singleton v. Wulff*, 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976). In *California v. Taylor*, 353 U.S. 553, 77 S.Ct. 1037, 1 L.Ed.2d 1034 (1957), the Supreme Court noted, at page 1037, Headnotes 2 and 3, that since a contention below had been waived: "We, accordingly, do not recognize this contention here." *See FMC Finance Corp. v. Murphree*, 632 F.2d 413 (5th Cir. 1980).

Furthermore, the point of error of the Appellants in the Ninth Court of Appeals of Texas, advancing error in the trial court's awarding damages for mental anguish, was not properly preserved. At trial, there was no objection to the evidence nor were there pleadings as required by Rule 94. Hence, the proffered point of error on appeal does not comport to any preserved error with the proper predicate made at trial. Nevertheless, we carefully considered and reviewed the Appellants' contentions. We concluded the same lacked merit.

In *Sisson, supra*, the Supreme Court of the United States recognized that protecting commercial shipping is at the heart of the admiralty jurisdiction. The court reasoned that that interest could not be served sufficiently if admiralty jurisdiction is restricted to those individuals actually engaged in commercial maritime activity. The Supreme Court further noted that not every accident in or on navigable waters had the effect of disrupting maritime

commerce. Hence, every such accident will not support the federal admiralty jurisdiction. *Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 102 S.Ct. 2654, 73 L.Ed.2d 300, at 306, note 5 (1982).

Appellants and the Maritime Law Association now contend that, under the facts of this case, federal maritime law should prevail to the exclusion of state wrongful death and survival statutes. Appellants attack mental anguish damages. There is no evidence or finding that the decedent was a seaman, thus invoking the Jones Act[1], or that the accident occurred more than one marine league offshore, thus invoking the Death on the High Seas Act.[2]

Furthermore, none of the cases cited by Appellants, *Moragne v. State Marine Line*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970), *Sea-Land Services v. Gaudet*, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974) and *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 106 S.Ct. 2485, 91 L.Ed.2d 174 (1986) support the proposition advanced by Appellants that maritime law preempts state wrongful death statutes when death occurs as a result of maritime activity in state territorial waters. In The *Tungus v. Skovgaard*, 358 U.S. 588, 79 S.Ct. 503, 3 L.Ed.2d 524 (1959), the Court upheld the applicability of the state wrongful death statute in the case of the death of a non-seaman aboard a vessel in state territorial waters.

The *Tallentire, supra*, case is discussed in the treatise written by Wright, Miller & Cooper. *See* 14 C. Wright, A.

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[1] 46 U.S.C.A. sec. 688 (West 1975).

[2] 46 U.S.C.A. sec. 761 (West 1975).

Miller & E. Cooper, Federal Practice and Procedure, sec. 3672 (Supp. 1990). Section 3672 is entitled "The 'Saving to Suitors' Clause. We quote:

> "Despite the Court's stated solicitude with regard to forum choice for survivors of those killed on the high seas, the actual holding of Offshore Logistics, which addressed a conflict that had developed among the Courts of Appeals as to the substantive effect of the Death on the High Seas Act, resolved that conflict against the interests of most survivors. Prior to Offshore Logistics, several lower courts had held that the first sentence of Section 7 of the Act preserved not only concurrent jurisdiction, but also any remedies provided by the state wrongful death statutes, many of which, unlike the federal statute, provide for non-pecuniary losses. [footnote omitted] Indeed, a literal reading of the statute, which states that it shall not affect the provisions of any state statute 'giving or regulating rights of action or remedies for death' [footnote omitted] would appear to support this view. Nonetheless, in Offshore Logistics the Court held that when an accident falls within the provisions of the Act, state wrongful death statutes are preempted. [footnote omitted] Thus, although survivors of a person killed in an accident on the high seas have a choice of forum, they may seek only the limited recovery provided by the Death on the High Seas Act. *If the same accident occurs within a marine league from shore, where the Death on the High Seas Act has no effect, the survivors can recover damages under the state wrongful death statute, including, when provided, reimbursement for non-economic losses.*" (Emphasis added)

We have reread the Statement of Facts. The defendants below, Texaco Refining & Marketing, Inc. (TRMI)

and Texaco Marine Services, Inc. (TMSI), did not object to the evidence concerning mental anguish. Dau's family was Vietnamese. They left their native country because the communists came; the family's living became very hard and they could not earn a living. They were forced to leave Vietnam. The family's opposition to the communists affected them adversely, economically and otherwise.

They were a Christian family of the Catholic faith. The father of Dau and the husband of Vi Thi Pham was wounded while serving in the military. The father was Do Van Tran. Do Tran came to the United States to get a necessary operation. The record reflects that, under Vietnamese customs and traditions, the oldest son was very important to the family and had special significance. He could act as a substitute parent. The oldest son had the responsibility of taking care of his parents as long as the parents were living. Dau Van Tran was the oldest son.

We conclude that this language and wording: " 'saving to suitors' in all cases all other remedies to which they are otherwise entitled" is of paramount significance in this case. This statute unambiguously speaks of all other cases and all other remedies. 28 U.S.C.A. sec. 1333 (1) (West 1966). Here, Pham and Dau Tran and Do Tran had other remedies; namely, the Texas Death Statute and the Texas Survivors' Statute. It is glaringly evident that none of the parties in *Sisson, supra,* were entitled to these remedies, distinguishing this case in a meaningful, important manner.

The Findings of Fact disclose that the dock involved was in Sabine Pass, Jefferson County, Texas, and that on

the date in question Dau Van Tran was not a crew member or an employee of the vessel, "Miss Mary", and/or the owners of the "Miss Mary".

In our first opinion, we overruled all other points of error advanced by Appellants and we affirm the overruling of such points of error.

The Judgment of the District Court of Jefferson County, Texas, is reinstated and reaffirmed.

AFFIRMED.

JACK BROOKSHIRE
JUSTICE

Opinion delivered
August 30, 1990.
Published.